No. 91-595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AVECOR, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OIL, CHEMICAL AND ATOMIC
WORKERS INTERNATIONAL UNION,
Intervenor.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

LYNN AGEE
(Counsel of Record)
DEBORAH GODWIN
AGEE, ALLEN, GODWIN,
MORRIS & LAURENZI
263 Court, Second Floor
Memphis, Tennessee 38103
(901) 528-1702

GREGORY MOONEY
General Counsel
KATHLEEN HOSTETLER
Assistant General Counsel
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION
P.O. Box 2812
Denver, CO 80201

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Board is required to consider evidence of employee turnover subsequent to an employer's unfair labor practices and a representation election, before deciding to issue a bargaining order in all cases where the employer's unfair labor practices are less than pervasive but nonetheless have the tendency to undermine union majority strength and impede the election process (*Gissel* II cases)?

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PETITION FOR A WRIT OF CERTIORARI

The Oil, Chemical and Atomic Workers International Union, petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision and judgment in *Avecor, Inc. v. National Labor Relations Board, Oil, Chemical and Atomic Workers International Union, Intervenor*, No. 89-1643 (April 26, 1991).

OPINIONS BELOW

The opinion of the court of appeals, is not yet reported, and is reprinted in the App. to this Petition at 1a-27a. The opinion of the National Labor Relations Board

("Board") is reported at 296 NLRB No. 94 (1989) and is reprinted at App. 36a-123a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on April 26, 1991. A timely Petition for Rehearing En Banc was denied on July 3, 1991. A revised judgment was entered by the court of appeals on July 25, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The pertinent statutory provision is Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e) which provides in relevant part as follows:

> The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides and transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order . . . *The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.* (emphasis added)

STATEMENT OF THE CASE

The Oil, Chemical and Atomic Workers International Union ("OCAW") petitioned for representation of the production and maintenance employees of Avecor, Inc., a small chemical pigment plant in Vanore, Tennessee. An election was conducted on June 25, 1987; the Union lost by a vote of twenty-two (22) to ten (10) with five (5) challenged ballots. The Union filed election objections and charges of unfair labor practices. Following hearings, an Administrative Law Judge ("ALJ") issued a decision on September 30, 1988 concluding that the Company had en-

gaged in numerous unfair labor practices including unlawful threats, promises, interrogations and discharges. The ALJ set aside the election results and ordered the Company to bargain with the Union. The ALJ found the Company's violations sufficiently pervasive and coercive, such that it would be "improbable that the use of traditional remedies here would be sufficient to ensure a fair rerun election." (App. 113a)

On the last day of the hearing the ALJ rejected the Company's proffer of a list of its employees as of May 27, 1988. The list was placed in the rejected exhibit file. The ALJ noted "the Board . . . has not included turnover as a factor in determining the appropriateness of the bargaining order remedy." (App. 110a n.28) The Company never alleged *extraordinary* employee turnover.

The Board adopted all of the ALJ's findings and conclusions (with one minor exception) in a decision issued September 30, 1988, less than one year later. The Company petitioned for review of the order and the Board cross-petitioned for enforcement. The OCAW intervened.

The court of appeals upheld the Board's factual findings with respect to numerous unfair labor practices including that the plant manager interrogated employees about their Union activities and sympathies, that the employer's agents threatened plant closure and the withholding of benefits should the employees choose Union representation and offered to increase pay and provide rewards should the employees reject the Union, in violation of § 8(a)(1) of the National Labor Relations Act ("NLRA") 29 U.S.C. § 158(a)(1). The court further upheld the findings that the employer's supervisors had offered employees money to rescind their Union authorization, and had threatened stricter rule enforcement should the employees choose Union representation. (App. 4a-13a) The court of appeals further upheld the unlawful discharge of Jeffrey Tidwell in violation of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), but found however

that the Board had wrongfully construed the firing of one employee, Leroy Hamby. The court of appeals further found that the Board had neglected to explain the inclusion of two employees of the bargaining unit.

Finally, the court below reversed the Board's bargaining order and remanded the case to the Board for elaboration of its findings and for consideration of employee turnover occurring up to the time the Board would issue a new bargaining order. (App. 23a) In so ruling the court creates a new "rule" allegedly "clarifying this area of [our] case law." (App. 23a) The court indicated that before issuing a category II bargaining order (for a "less extraordinary case marked by less pervasive unfair labor practices which nonetheless have a tendency to undermine Union majority strength") the Board must carefully consider employee turnover (App. 23a)

The Board's findings of fact, so long as supported by substantial evidence are to be conclusive. 29 U.S.C. § 160(e). The courts owe substantial deference to inferences drawn from the facts, as well as to the Board's choice of remedy. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). The court of appeals, while citing the principles, fails to follow them.

The District of Columbia Circuit has adopted a new rule, contrary to Board precedent, other Circuits, and its own precedent, that the Board is required in all *Gissell* II cases to consider employee turnover.

REASONS FOR GRANTING THE WRIT

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court recognized two sets of conditions under which it is appropriate for the Board to issue a bargaining order. The first category which has been known as the *Gissel* I category allows the Board to order an employer to bargain with a Union where the employer's unfair labor practices are exceptional, outrageous and pervasive and which would have the effect of preventing a fair elec-

tion. *Id.* at 613-615. The second set of circumstances, known as the *Gissel* II category consist of cases which involve less extraordinary circumstances "marked by less pervasive practices which nonetheless have a tendency to undermine Union majority strength and impede the election process." *Id.* at 614. The court in *Gissel* recognized that it was the Board's responsibility to ascertain on a case by case basis whether the conditions were such as to prevent a fair and reliable election, drawing on its fund of knowledge and expertise in the area. *Id.* at 612-614. Once the Board finds that there is a basis for issuing a bargaining order, the court of appeals review is limited to determining whether the Board has abused its discretion in ordering the remedy. In the present case, the Board adopted the ALJ's determination that the employer's violations were of the *Gissel* II variety and that a bargaining order was warranted.

In making the determination of whether a bargaining order should be issued in a *Gissel* II case, the Board has consistently held that it is not necessary to consider conditions in the bargaining unit, including employee turnover, which have occurred subsequent to the unfair labor practices. *Impact Industries, Inc.*, 285 NLRB 2 (1987), *enf'd. denied*, 847 F.2d 379 (7th Cir. 1988); *Long-Airdox Co.*, 277 NLRB 1157 (1985). The court of appeals in the present case held, however, that before the Board can issue a bargaining order in a *Gissell* II case, the Board must carefully consider employee turnover that has occurred *up to the time it would issue the new order.* (emphasis added)

This new "rule" conflicts with several pre-*Gissel* cases of this Court and creates a conflict amongst the circuit courts of appeals. This Court has held that the Board could properly ignore subsequent events, including conditions in the bargaining unit at the time of the order, when deciding to issue a bargaining order. *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962); *Frank Bros. v. NLRB*, 321

U.S. 701, 703-706 (1944); *NLRB v. Lorillard Co.*, 314 U.S. 512, 513 (1942).

The Panel below itself recognized the divergence amongst circuit courts as to whether post-election events, including turnover, should be taken into consideration in determining the need for a bargaining order. (App. 22a) Note, *"After All, Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Orders?*, 31 Stan. L. Rev. 505, 512-521 (1979) (citing cases). The Ninth Circuit in *NLRB v. L.B. Foster Co.*, 418 F.2d 1 (1969), *cert. denied*, 397 U.S. 990 (1970) held that requiring the Board to consider subsequent events would reward the employer for engaging in dilatory tactics after litigation has commenced. The Third, Fifth, Sixth, and Seventh Circuits have followed this rule. *NLRB v. Atlas Microfilming*, 753 F.2d 313 (3rd Cir. 1985); *United Supermarkets v. NLRB*, 862 F.2d 549 (5th Cir. 1989); *G.P.D., Inc. v. NLRB*, 430 F.2d 963 (6th Cir. 1970) *cert. denied*, 401 U.S. 974 (1971); *New Alaska Development Corp. v. NLRB*, 441 F.2d 491 (7th Cir. 1971); *NLRB v. Drives, Inc.*, 440 F.2d 354 (7th Cir.), *cert. denied*, 404 U.S. 912 (1971).

The Panel below further recognized the inconsistency of its own decisions. (App. 22a) *See, Amazing Stores, Inc. v. NLRB*, 887 F.2d 328 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1477 (1990) (not necessary for Board to produce evidence of employee turnover unless employer's underlying violations were neither pervasive nor enduring); *St. Francis Fed'n of Nurses and Health Professionals v. NLRB*, 729 F.2d 844, 854-856 (D.C. Cir. 1984). (the court has "never imposed a blanket requirement on the Board that it consider subsequent events before issuing a bargaining order"); compare *NLRB v. Creative Food Design, Ltd.*, 852 F.2d 1295 (D.C. Cir. 1988) (the Board must consider turnover).

While some courts have required the Board to consider extraordinary employee turnover as one factor, none have

gone to far as to require the Board to consider evidence of employee turnover up to the time the order is enforced in every *Gissel* II case. *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979); *NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302 (5th Cir. 1973). Other recent appellate courts have refused to enforce bargaining orders where there has been what the court considered an inordinate delay, occasioned by the Board, between the time of the unfair labor practices and the issuance of its order, which was not occasioned by dilatory tactics of the employer. *NLRB v. Koenig Ironworks*, 856 F.2d 1 (2d Cir. 1988). *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21 (8th Cir. 1991). However, no such delay has occurred in this case and delay is not relied upon by the court of appeals as a basis for its ruling. The issuance of the new "rule" by the court of appeals will reward Avecor for its litigiousness since even normal delays will result in employee turnover.

The court of appeals found that the Board met two of three elements required to grant a bargaining order, i.e. that 1) the Union had established a card majority and 2) the employer's unfair labor practices had a tendency to undermine majority strength and impede the election process. The court found that a third element, i.e. the ineffectiveness of traditional remedies, was not met. This was so, the court reasoned, because it had removed one of the discharges as an unfair labor practice, the Board had failed to consider turnover in the bargaining unit, and the Board had failed to explain why the bargaining order was essential and other traditional remedies would not be sufficient. The court stated that the ALJ did not adequately explain why other than traditional remedies less destructive to employees' rights would not be adequate. To the contrary, the ALJ analyzed at length the factors supporting the bargaining order citing the total circumstances of the case, the small size of the bargaining unit, the unlawful discharge of two employees, the likely impact of all the unlawful conduct on unit em-

p'oyees, and the fact that much of the unlawful conduct was committed by high Company officials. (App. 110a, 112a) The Panel below asks for more. The court cites for example the "likelihood managers would continue their unlawful conduct" (App. 25a). Such a finding that managers would continue unlawful conduct would be one based on pure speculation.

The approach of the court of appeals is unfair to the employees who are the victims of the Company's unfair labor practices and impractical at best. The mandatory consideration of employee turnover leads to a hindsight approach which allows the employer to continue to submit evidence of employee turnover presumably on as frequent a basis as it sees fit. This approach further assumes erroneously that employee turnover purges unfair labor practices. Rather, high turnover following unfair labor practices may have a further chilling effect on a Union supporter's sympathies. The court's approach encourages an employer to lay off employees and hire new ones to prolong the ligitation process and artificially "purge" its previous unfair labor practices. The court of appeals' new rule handcuffs the Board since there will be turnover even with normal delays occasioned in the Board process.

Further, it has long been Board law that once a majority is obtained it is assumed that it continues in the same ratio as it had in the past. *Chemetron Corp.*, 258 NLRB No. 159 (1981). It is undisputed here that the Union had reached a card majority. Thus, the unfair labor practices of the employer in all likelihood destroyed that majority and it should be presumed in the absence of such unfair labor practices that the majority would have continued. The wishes of the majority of employees of Avecor, Inc. would be promoted rather than defeated by issuance of the bargaining order.

The decision of the court of appeals fails to give proper deference to the factual findings of the Board, and fails to defer to the statutory authority and expertise of

the Board in designing proper remedies for unfair labor practices. The court of appeals decision creates a conflict with Board precedent and amongst the circuit courts of appeals.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

LYNN AGEE
(Counsel of Record)
DEBORAH GODWIN
AGEE, ALLEN, GODWIN,
MORRIS & LAURENZI
263 Court, Second Floor
Memphis, Tennessee 38103
(901) 528-1702

GREGORY MOONEY
General Counsel
KATHLEEN HOSTETLER
Assistant General Counsel
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION
P.O. Box 2812
Denver, CO 80201

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 30, 1990 Decided April 26, 1991

No. 89-1643

AVECOR, INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,
Intervenor

Petition for Review of an Order of the
National Labor Relations Board

Harold R. Weinrich for petitioner. *Ann Hale-Smith* and *Jeffrey M. Mintz* were on the brief for petitioner.

Judith P. Flower, Attorney, National Labor Relations Board ("NLRB"), with whom *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Barbara A. Atkin*, Supervisory Attorney, NLRB, were on the brief, for respondent.

John W. McKendree and *Lynn Agee* were on the brief for intervenor.

Before BUCKLEY, WILLIAMS, and THOMAS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: After chemical plant workers voted against union representation, the union charged the employer with unfair labor practices. The administrative law judge concluded that the employer had indeed violated the National Labor Relations Act, that the violations invalidated the election, that the misconduct was so serious that a fair election was essentially impossible, and that the company must therefore bargain with the unelected union. The National Labor Relations Board affirmed the decision. We hold that the Board wrongly construed the firing of an employee as an unfair labor practice, neglected to explain its conclusion about the composition of the bargaining unit, and failed to undertake the proper inquiries and make the requisite findings before imposing the bargaining order.

I. BACKGROUND

The basic facts are straightforward and undisputed. Avecor, Inc., operates a small chemical pigment plant in Vonore, Tennessee. The United Steelworkers attempted to organize plant workers in 1986, but, in an election conducted by the NLRB, the union received no votes. The Steelworkers did not charge the company with any unfair labor practices.

In the spring of 1987, some Avecor employees decided to try again with a different union. On April 23, quality control trainee Jeff Tidwell walked into the laboratory office, secured the telephone number for the Oil, Chemical and Atomic Workers International Union, and, in answer to a question, told his supervisor what he was doing. Another employee telephoned the union and arranged a meeting. The following day at midnight, about ten Avecor employees met union organizers at a service station. While there, Tidwell and several others signed union

authorization cards. On April 30, the union petitioned the NLRB for an election. In a June 25 election, the union lost by a vote of twenty-two to ten, with five additional ballots challenged.

The union filed objections to the election and charged Avecor with unfair labor practices. An administrative law judge ("ALJ") held hearings in January and May-June 1988. In a decision issued September 30, 1988, he concluded that the company had engaged in various unlawful threats, promises, interrogations, and discharges. He set aside the election results and ordered the company to bargain with the union. Almost a year later, on September 22, 1989, the NLRB issued a decision that, with one minor and somewhat baffling exception, adopted all of the ALJ's findings and conclusions. *Avecor, Inc.*, 296 N.L.R.B. No. 94 (1989). This appeal followed.

II. Discussion

A. Standard of Review

Our scope of review is limited. The Board's findings of fact, if supported by substantial evidence, are conclusive. 29 U.S.C. § 160(e) (1988); *see St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 144 (D.C. Cir. 1989). We owe substantial deference to inferences drawn from the facts, *see Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980); to choices of remedies, *see NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); and, overall, to the "reasoned exercise of [the Board's] expert judgment," *Comair Corp. v. NLRB*, 721 F.2d 1355, 1373 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984).

We do not, however, merely rubber-stamp NLRB decisions. As we said in *Peoples Gas*:

> [T]his court is a reviewing court and does not function simply as the Board's enforcement arm. It is our responsibility to examine carefully both the Board's findings and its reasoning, to assure that the

> Board has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy which can fairly be said to effectuate the purposes of the Act.

629 F.2d at 42.

B. Unfair Labor Practices

The union charged the company with committing multiple unfair labor practices. The NLRB found merit in some charges and rejected others. As the union has not appealed the rejected ones, we deal here only with those that the Board credited and that the employer appeals.

1. *Discharges*

Two provisions of the National Labor Relations Act ("NLRA") apply to improper terminations. Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1). Section 8(a)(3) forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

Where a termination is alleged to be improper, the NLRB General Counsel bears the burden of demonstrating that "an antiunion animus contributed to the employer's decision to discharge an employee." *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393, 395 (1983) (citing *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)). Circumstantial evidence will suffice. *See Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988).

Once the General Counsel has made this prima facie showing, the employer may negate the unfair labor prac-

tice finding by showing "by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union." *Transportation Management*, 462 U.S. at 395. Engaging in union activities does not shield an employee from being fired; the NLRA proscribes only terminations that are motivated by the union activities. *See Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987).

Here, the Board concluded that Avecor had improperly discharged two men, Jeff Tidwell and Leroy Hamby.

a. Jeff Tidwell

Tidwell's job was to test pigment samples to ensure that the color matched the customer's order. On April 24, 1987, he experienced trouble with a large order. Production had to be halted while he tried various adjustments. In frustration, Tidwell kicked cans and jugs while cursing loudly.

Three days later, the laboratory manager, Ed Pollard, accused Tidwell of having "lost his cool" and offered him a choice between demotion and a written warning. ALJ Decision at 24 (appendix to *Avecor*, 296 N.L.R.B. No. 94). Tidwell chose the latter. The next day he stopped by Pollard's office to secure the warning but was told that it was not yet ready.

Later that day, another supervisor instructed Tidwell to report to Pollard and Larry Willoughby, the plant manager. Willoughby told Tidwell that the quality control job seemed to be more than he could handle. Pollard had erred in offering the write-up or demotion choice, Willoughby continued, because the company's policy was that "if you don't make it, you go out the door." *Id.* Under that policy, he said, Tidwell was fired. Tidwell protested that he was not to blame for the problems he had encountered on the job and that, in any event, the company should not dismiss people who could ably handle other tasks at the plant. Willoughby was unswayed.

The ALJ concluded that the prima facie burden had been met. He found that Tidwell had secured the union telephone number, attended the midnight meeting, signed an authorization card, and persuaded another employee to sign a card. The ALJ also found that Avecor supervisors knew of the union from the outset and that Tidwell had discussed it with two supervisors. Finally, the ALJ believed that the circumstances of the firing suggested "disparate treatment" of Tidwell: "the questionable validity of the basis for the discharge, Respondent's change of position regarding the discipline imposed on Tidwell, and the timing of the discharge in relation to the beginning of the union activity." *Id.* at 25.

No evidence directly showed that Willoughby and Pollard, the supervisors who fired Tidwell, knew of his union activities. In concluding that they did have such knowledge, the ALJ presumably applied the small-plant doctrine, although he cited it only in connection with another matter. The doctrine "permits an inference that the company knew of the union activities of specific employees from evidence that union activities 'were carried on in such a manner, or at times that in the normal course of events, [the company] must have noticed them.'" *Chauffeurs, Teamsters & Helpers, Local 633 v. NLRB*, 509 F.2d 490, 496 (D.C. Cir. 1974) (quoting *Hadley Mfg. Corp.*, 108 N.L.R.B. 1641, 1650 (1954)). In this case, the bargaining unit consisted of fewer than forty employees; the evidence supporting the prima facie showing, viewed through the small-plant doctrine, is ample.

Avecor argued that the upgraded discipline had a benign explanation that, it true, would rebut the prima facie showing and defeat the unfair labor practice charge. Tidwell's was not a first offense. After certain earlier outbursts, he had been disciplined and, in February 1987, warned that such conduct could cost him his job. The company president, Leonard Klarich, testified that he had instructed supervisors to fire Tidwell if he "ever again

sounds off or loses control." ALJ Decision at 26. In Avecor's version of events, Pollard, a relatively new employee, was unaware of this history when he imposed the initial punishment. Klarich, who was out of town, ordered the firing when he learned by telephone of Tidwell's misbehavior. The company also cited Willoughby's policy against demoting inadequate employees as an additional legitimate justification. Thus, Avecor contended, the supervisors acted properly in firing Tidwell.

The ALJ refused to accept nearly every element of Avecor's explanation. Tidwell's earlier outburst had been "specifically different in type": racial slurs directed at a supervisor rather than an untargeted tantrum. *Id.* at 27. The company had not given him a written warning after the previous incident. His next job evaluation had been positive, had made no mention of the incident, and had resulted in a salary increase. Another supervisor, Sandy Thomas, evidently did not know of Klarich's instructions to fire Tidwell if he misbehaved again. No evidence indicated that Tidwell was at fault for the problems on the production line that provoked his tantrum. Willoughby's assertion that Pollard was a new employee "was never substantiated"; moreover, Avecor offered "no excuse for failing to advise [Pollard] of past job deficiencies of those relatively few people under his supervision" or for failing to advise him of the alleged policy against demotions. *Id.* at 27 n.15, 28.

Finally, the ALJ found Klarich's account of the firing implausible. Klarich testified that he ordered the discharge upon learning that Tidwell, in the ALJ's paraphrase, had "been involved in an incident." *Id.* at 27. According to the ALJ:

> Klarich admittedly did not seek to ascertain any facts of Tidwell's conduct on April 24 before directing the reversal of Pollard. There was no concern shown by Klarich for whether Tidwell had repeated the offense of issuing racial slurs which Klarich had found so

> reprehensible in the earlier incident. Even the fact that Klarich issued the discharge decision by telephone reflects the highly unusual treatment of the Tidwell situation. Klarich could not recall . . . a previous decision to discharge a rank and file employee by telephone.

Id. at 28. He found, in short, that the company's decision to upgrade the discipline constituted "strong evidence of its unlawful motivation." *Id.*

We find one prong of the ALJ's argument unconvincing. A racial epithet directed at a supervisor is not "different in type" from a tantrum; a supervisor could reasonably view both as evidence of a temperament unsuited to quality control work. Otherwise the evidence cited by the ALJ appears sufficient. Avecor's alternative explanation for the Tidwell firing, while plausible, rests on too many unsupported assumptions to rebut the prima facie showing. Accordingly, we uphold the NLRB's conclusion that the Tidwell firing violated sections 8(a)(3) and (1) of the NLRA.

b. Leroy Hamby

Hamby was hired as a temporary maintenance helper in January 1987. In March he was given a choice between a lay-off or a demotion to janitor; Willoughby's no-demotion policy evidently was inapplicable. Hamby chose demotion. On April 27, Hamby secured a union authorization card from a fellow employee, Bucky Rodgers, and signed it. Four days later, Hamby's supervisor, Larry Murphy, fired him for inefficiency. Hamby did not press Murphy for any further explanation.

The ALJ acknowledged that "[t]he weakness of the General Counsel's case" was the absence of any direct evidence that Avecor knew of Hamby's connection to the union. *Id.* at 33. Hamby had spoken with Bucky Rodgers and signed the authorization card. That five-minute en-

counter was the sum of Hamby's involvement with the union. It occurred on premises during work hours, but Hamby was on a break and, when he signed the card, no supervisors were present. While some supervisors believed at the time that Rodgers was a union supporter, *id.* at 34, there is no evidence that any of them was aware of his brief encounter with Hamby. As will be detailed below, Hamby had twice discussed the union with supervisors; in neither instance, however, had he revealed his own sentiments.

The ALJ nevertheless concluded that the company knew of Hamby's involvement. First, Avecor submitted no evidence supporting the allegation that Hamby had been a poor employee. Second, at the time Hamby talked with Rodgers and signed the card, supervisor Murphy was closely monitoring Hamby's work performance is preparation for firing him. The implication, which the ALJ did not spell out, appears to be that Murphy probably saw Hamby and Rodgers together, and concluded that Hamby was a union supporter. Finally, four days after signing the union card, Hamby was fired.

Here, the ALJ expressly applied the small-plant doctrine. He explained: "Respondent employed less than 40 unit employees, and the plant was located in a small community. It was aware early on of union talk among its employees and specifically aware of the first union meeting after the second shift on April 24." *Id.* at 33-34. The evidence, as amplified through the small-plant doctrine, led the ALJ to conclude that "it may be fairly inferred that Respondent was aware of Hamby's union involvement." *Id.* at 34.

The evidence supporting that inference is, we find, far from substantial. Murphy's testimony suggests that he might not have begun monitoring Hamby until sometime after the Rodgers encounter. In any event, Murphy would have had no reason to watch Hamby's work performance during a break.

Even if Murphy knew of it at the time, the fact that Hamby was talking to Rodgers revealed nothing about Hamby's union sympathies. What the NLRB terms Hamby's "propensity to talk to other employees," Brief for Respondent at 36, was no secret to Avecor supervisors. Indeed, Murphy testified that the firing came about partly because Hamby spent too much time chatting with co-workers and neglecting his janitorial duties.

A discharge cannot stem from an improper motivation where the employer is ignorant of the employee's union activity. *See Chauffeurs, Teamsters & Helpers*, 509 F.2d at 496 n.27. Hamby's activity was isolated, brief, and not especially public. The small-plant doctrine reduces the weight of evidence necessary to impute knowledge of union activities to supervisors, but, as the Sixth Circuit noted, the doctrine does not wholly eliminate the need for evidence:

> The small size of the facility . . . does not give rise to a *presumption* of knowledge that an employer must rebut to prevent establishment of the Board's prima macie case. Rather, the doctrine permits an inference of employer knowledge only if the Board establishes by other evidence, direct or circumstantial, that an employer had reason to notice the union activities in the facility.

NLRB v. Health Care Logistics, Inc., 784 F.2d 232, 236 (6th Cir. 1986) (emphasis in original). Even in a tiny plant with strongly anti-union management, supervisors are not omniscient. Because there is no substantial evidence that Avecor knew of Hamby's union activity, we conclude that the prima facie showing was not made. We therefore set aside the finding that Hamby's discharge violated the NLRA.

2. *Interrogations*

An employer violates section 8(a)(1) when he "coercively interrogates employees about their union activi-

ties and sympathies." *St. Agnes*, 871 F.2d at 143. Whether a particular encounter amounts to coercive interrogation depends on the totality of the circumstances. *Id.*

Here, the ALJ concluded that Willoughby, the plant manager, had improperly questioned two employees about their union sympathies. On April 27 or 28, he asked Darrell Martin if he knew anything about the union. Martin replied that he preferred not to discuss it. Willoughby asked if Martin was for or against the union. Martin responded, according to the ALJ, "with a crude and vulgar analogy indicating his support of the Union." Willoughby let the matter drop. ALJ Decision at 9. On about June 20, Willoughby asked James White how he felt about the union and whether he had signed an authorization card. White replied that he did not know "a whole lot" about the union. He added, untruthfully, that he had not signed a card. *Id.* at 10. Avecor does not dispute these findings. We grant the Board's petition to enforce this part of its order.

3. *Promises and threats*

An employer violates section 8(a)(1) by threatening to penalize employees if they choose union representation, *see Southwire*, 820 F.2d at 457, or by offering to reward employees if they reject it, *see St. Agnes*, 871 F.2d at 143. "[W]e 'recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.'" *Id.* (quoting *Gissel*, 395 U.S. at 620).

Here, the ALJ found several violations. Within a few days before the April 24 midnight meeting, janitor Hamby asked supervisor Joe Ingram what he thought about the union. Ingram replied "that the Union would cause the company to close the doors." ALJ Decision at 8. On April 27, the loquacious Hamby asked Denver Millsaps,

the production manager, why the supervisors had held a meeting that afternoon. Millsaps replied that they had discussed whether to increase the pay of machine operators in order to keep the union out. Hamby asked if anything had been said about his own wages. Millsaps told Hamby to raise the matter with his supervisor. Prior to May 14, plant manager Willoughby told a fellow supervisor, Carl Farrell, that the company would pay fifty dollars to any employee who would rescind his union authorization. Farrell passed the offer on to Mac Coley, a quality control employee. On or about May 14, Willoughby told the assembled employees that if the union represented them, the company would deal more strictly with rule-breakers, whereas without a union, the company would be more generous with benefits. At the same gathering, president Klarich said that employees could expect more raises without a union. Finally, a few days before the election, Willoughby told the unit employees not to expect any more favors if they chose the union.

Avecor raises a number of arguments, only one of which merits discussion. The company argues that Ingram's prediction of a plant closure was harmless because Hamby signed a union authorization card three days later. The remark could not have been coercive, Avecor suggests, because Hamby was not coerced. The argument, however, misstates the law. We look at a remarks tendency to coerce, not at its actual impact. *See Southwest Regional Joint Bd. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

The ALJ's interpretation of the Ingram remarks does give us pause, but for a different reason. The evidence shows that one supervisor, on one occasion, in response to a direct question, in the hearing of one employee, said that the plant would close if the union were elected. The objective facts, we think, fall short of the ALJ's conclusion that Avecor had committed a "hallmark" violation of the NLRA by "[t]hreatening its employees that it would close its doors if they selected the Union to represent

them." ALJ Decision at 49, 51. *Cf. Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1161 (7th Cir. 1990) (Easterbrook, J., concurring) ("if employees are indeed such wee, tim'rous beasties, then elections are pointless . . . .").

We defer to the ALJ's conclusion that the Ingram remark violated the Act, though it skirts the outermost boundaries of our deference. We find that substantial evidence supports the other violations.

C. Bargaining Unit

When it sets out *de novo* to define a bargaining unit, the NLRB determines which employees share common interests such that they could fruitfully bargain in concert. *See NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). This is a matter for the Board's expertise, and we will rarely disturb its conclusion. *See id.* at 496.

When the parties stipulate the bargaining unit, however, the Board has a more limited role. First, it must ensure that the stipulated terms do not conflict with fundamental labor principles. Having done so, its task is simply to enforce the agreement. If the terms of the stipulation are unambiguous, the Board must hold the parties to its text. If the terms are ambiguous, the Board may look to the usual factors governing the definition of an "appropriate unit," including the community-of-interest standard. *See NLRB v. Speedway Petroleum*, 768 F.2d 151, 155-56 (7th Cir. 1985); *International Union of Elec., Radio & Mach. Workers v. NLRB*, 418 F.2d 1191, 1199 (D.C. Cir. 1969).

Here, Avecor and the union stipulated this definition of the bargaining unit:

> All production and maintenance employees employed by the Employer at its Vonore, Tennessee facility, including leadmen, laboratory employees, dry color employees, shipping and receiving employees, liquid

> employees and quality control employees, but excluding all office clerical employees, guards and supervisors as defined in the Act.

ALJ Decision at 41. The parties subsequently disagreed about whether this stipulated unit included two particular employees. Avecor argued that they were "plant clericals" who belonged in the unit; the union contended that they were "office clerical employees" who belonged outside it. Because the two did not sign union authorization cards, their presence would erode and for some periods extinguish the union's majority support.

The ALJ described the two employees' work locations, duties, and other aspects of their jobs. Order entry clerk Lisa McWaters worked in the main office, alongside the office clerical employees. Lab secretary Diane Byrum worked in the lab manager's office, which was adjacent to the main office. The ALJ wrote:

> I conclude that McWaters and Byrum's work interests were more closely associated with that of office clericals than unit employees by virtue not only of their work location but also their job duties and working conditions. Neither performed production work of any type even on a sporadic or part time basis. They worked different hours from most of the production employees. That Respondent itself viewed [them] as being more closely associated with clerical employees in interests was demonstrated by its failure to grant them the 40 cent per hour increase granted the unit employees in May. The lab manager's use of Byrum to type a personnel memo reflects the same point. While the paperwork generated by Byrum and McWaters related to production work their direct contact with unit employees does not appear to be extensive or significantly greater than their contact with office clericals. Accordingly, I conclude that Byrum and McWaters do not have a

> sufficient community of interests with production unit employees to warrant their inclusion in the unit.

Id. at 42-43. The Board adopted the finding regarding McWaters but declined to reach that regarding Byrum. The NLRB explained that "we find it unnecessary to pass on Byrum's status" because her presence in the unit would not have deprived the union of its majority support. 296 N.L.R.B. No. 94, at 2 n.3.

The treatment of this issue is flawed on three grounds. First, we are troubled that neither the ALJ nor the Board acknowledged the limited nature of their task: to interpret and enforce the parties' stipulation, and to consider NLRB doctrines only insofar as the stipulation was ambiguous.

Second, we are unable to ascertain the Board's intent concerning Byrum. The Board ordered the company to bargain with the union as representative of employees in the bargaining unit. Byrum's status may not affect the union's card majority, but it will determine Byrum's (or her successor's) potential for membership in the union. Does "we find it unnecessary to pass on Byrum's status" place her in the unit or out of it? We cannot defer to what we cannot decipher.

Finally, and most importantly, the Board failed to distinguish what appears to be a controlling precedent. In *Columbia Textile Services, Inc.*, 293 N.L.R.B. No. 127 (1989), the two disputed clerical employees worked in an enclosed office; they answered to the office clerical supervisor; they ate separately from production personnel; and they performed purely clerical tasks. Nevertheless, the Board reversed the ALJ and included the two in the production bargaining unit because they had significant contact with production employees and because they "perform[ed] duties that are functionally integrated with the production process." *Id.* at 12. The same could be said of Byrum and McWaters.

The Board issued *Columbia Textile* while the ALJ's recommended Avecor decision was awaiting review. "When the Board adopts an ALJ opinion that is in tension with intervening Board precedent, a duty arises for the Board to explain the significant conflicts." *United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1437 (D.C. Cir. 1989). By neglecting to mention *Columbia Textile*, the Board disregarded this duty.

On remand, accordingly, the Board must address the applicability of *Columbia Textile* and decide where Byrum and McWaters belong.

D. Election

The union filed twenty-two objections to the election but subsequently withdrew twelve of them. Of the ten remaining, the ALJ found merit in only one:

> Hamby's discharge occurred within the critical period between the filing of the petition and the holding of the election. Generally, conduct which violates Section 8(a)(1) of the Act is, a fortiori, conduct which interferes with the election. I find this objection has merit.

ALJ Decision at 39 (citation omitted). The ALJ went on to find that other violations, to which the union had not specifically objected, had also tainted the election. Accordingly, he concluded, the election must be set aside.

Avecor asks that we vacate the Board's order in its entirety. The company does not contend, however, that the election adequately measured employee sentiment. Although we have ruled that the ALJ's finding with regard to Hamby's discharge was flawed, we nevertheless acknowledge that the Board has "particularly broad discretion" to decide whether electoral conditions have so deteriorated that the results must be dismissed. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1562 (D.C. Cir. 1984). Its determination here was not an abuse of discretion.

1. *General principles*

Freedom of employee choice is "a matter at the very center of our national labor relations policy," *Conair*, 721 F.2d at 1377-78, and a secret election is the preferred method of gauging choice, *see Gissel*, 395 U.S. at 602; *NLRB v. Creative Food Design, Ltd.*, 852 F.2d 1295, 1302 (D.C. Cir. 1988). The fact that an employer's actions have tainted one election does not necessarily mean that subsequent elections will also be tainted. Where a fair rerun election is possible, it must be held. *See St. Agnes*, 871 F.2d at 147.

There are times, however, when one will not be possible. Where the employer's unfair labor practices have been "so pervasive and extensive that they effectively prevent the holding of a fair election," the Board may order the employer to bargain with a union that had secured cards from a majority of unit employees but failed in the ensuing election to receive a majority vote. *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1477 (1990). Under the Supreme Court's decision in *Gissel*, the Board may issue a bargaining order in two categories of cases: "exceptional cases marked by outrageous and pervasive unfair labor practices" ("category I") and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process" ("category II"). *Gissel*, 395 U.S. at 613-14 (internal quotes omitted). Here, the ALJ concluded that Avecor's violations "fall within the second *Gissel* category." ALJ Decision at 48.

We have described a bargaining order as an " 'extraordinary remedy' " that is not " 'automatically entitled to enforcement.' " *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434, 442-43 (D.C. Cir. 1972) (quoting *NLRB v. American Cable Sys., Inc.*, 427 F.2d 446, 448 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970)). Before we will

enforce a category II order, we must find that substantial evidence supports three conclusions:

> First, the Union, at some time, must have had majority support within the bargaining unit. Second, the employer's unfair labor practices must have had the tendency to undermine majority strength and impede the election process. Finally, the Board must determine that the possibility of erasing the effects of past practices and of ensuring a fair rerun election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order.

St. Francis Fed'n of Nurses & Health Professionals v. NLRB, 729 F.2d 844, 854-55 (D.C. Cir. 1984). The third finding, in addition, must be supported by a reasoned explanation that addresses several subissues. *See Peoples Gas*, 629 F.2d at 46. Here, only the first two requirements are met.

2. St. Francis *test applied*

a. Card majority

The Board has the authority to issue a category II bargaining order "even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered." *Gissel*, 395 U.S. at 610. There is no dispute here that the union had a card majority for at least a brief period. Avecor arues that we should not impose a bargaining order where the majority was so ephemeral.

The duration of the card majority depends on whether the Board includes the two disputed clerical employees in the bargaining unit. Excluding them both, as the ALJ did, produces a majority that lasts for all but four days of the two-month pre-election period. With one of them in the unit and one outside it, the majority's lifespan

shrinks to twelve days. With both of them in the unit, the majority survives for just one day.

We have no inkling of where the Board will place the two employees. *Gissel*, though, instructs us that the Board must only make "a showing that at one point the union had a majority." *Id.* at 614. That showing has been made. We are unaware of any requirement that the card majority must survive for a particular duration in order to support a bargaining order, and we decline to introduce one here.

b. Impact of employer's actions

Avecor also argues that it was not responsible for the demise of the card majority. It notes that another court vacated a bargaining order where the union's loss of majority support occurred "through no activity by the employer and prior to any employer violations." *Struthers-Dunn, Inc. v. NLRB*, 574 F.2d 796, 802 (3d Cir. 1978).

Here, however, Avecor's unfair practices were well underway before the union lost its majority status. With both disputed employees in the bargaining unit, the union had a card majority from April 27 to 28. On or before April 28, Ingram told Hamby that the plant would close if it was unionized, Millsaps told Hamby that the company might raise the pay of machine operators to keep the union out, Willoughby fired Tidwell, and Willoughby interogated Martin about his union views. Even if these actions did not cause Coley to withdraw his card—the April 28 event that deprived the union of its majority—they may well have kept other employees from signing cards, and thereby prevented the union from increasing its majority prior to April 28 or from regaining it thereafter. If Byrum or McWaters is ultimately excluded from the unit, the union regained its card majority between May 5 and 15. Additional unfair labor practices, including Klarich's and Willoughby's coercive remarks to the assembled employees, occurred during this period. These

practices meet the minimum requirements of the second *St. Francis* test: Taken together, they will support an inference that Avecor's actions "had the tendency to undermine majority strength and impede the election process." 729 F.2d at 854.

c. Effectiveness of traditional remedies

This factor is frequently dispositive. The normal cure for an unfair election is a fair election, and the Board wields an array of remedies to enhance its likelihood. The Board may order the employer, for example, to cease and desist his unfair practices, to post a notice or read one aloud, and to reinstate and reimburse unlawfully discharged employees. *See St. Agnes*, 871 F.2d at 147; *Conair*, 721 F.2d at 1385-87. A bargaining order is appropriate only where the unfair practices have so intimidated employees that an election, even with the full complement of traditional NLRB rmedies, would not reflect their true sentiments.

Three factors preclude enforcement of the bargaining order here. First, our conclusions above have extinguished at least one of the "hallmark violations" supporting the order, the Hamby termination. Second, the ALJ and the Board failed to consider turnover in the bargaining unit. Third, the ALJ and the Board failed to explain why they concluded that a bargaining order is essential, an explanation that our precedents emphatically mandate. *See, e.g., Amazing Stores*, 887 F.2d at 330-31; *Peoples Gas*, 629 F.2d at 45-46.

(i) Hallmark violations

The ALJ spoke of Avecor's "hallmark" violations, which he defined as "[p]articularly pervasive unfair labor practices which are deemed highly coercive and are likely to have a longer lasting and inhibitive [e]ffect on a substantial percentage of the work force." ALJ Decision at 48. He emphasized the firings of Tidwell and

Hamby, which he characterized as "an unlawful discharge of roughly 6 percent of the unit" that was "likely to have a substantial and lasting impact on employee free choice," *id.*, and Ingram's statement to Hamby that the company might close its doors if the union won. He also noted that many of the violations were especially coercive because they were committed by high management officials.

We have concluded that the Hamby firing was not unlawful, and we have suggested that Ingram's isolated remark to Hamby was less heinous than the ALJ painted it. Consequently, "a significant question is presented whether the remaining unfair labor practices in this case are serious enough, or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair rerun election." *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1011 (D.C. Cir. 1981). The Board must, therefore, consider whether the remaining violations justify a bargaining order.

(ii) Turnover

A bargaining order is appropriate where the employer has so polluted the electoral process that the wishes of the employees will be better reflected by an old card majority than by a new election. Substantial changes in the workplace, however, may render that finding untenable. Where many of the intimidated employees have moved on, and where the company is under order not to resume its unlawful ways, a fair election may well be possible. A bargaining order in those circumstances may unjustly bind new employees to the preferences of departed ones. "Where a remedial order has the primary effect of negating the rights of current employees rather than furthering them, it defeats, rather than effectuates, the policies of the N.L.R.A." *Ship Shape Maintenance*, 474 F.2d at 443 (footnote omitted); *see also Creative Food Design*, 852 F.2d at 1302-03.

According to the company, the bargaining unit had changed considerably as a result of growth and turnover. The company submitted evidence indicating that as of May 27, 1988, only about half of the workers in the bargaining unit had been in its employ at the time of the election. The ALJ refused to consider this evidence. He explained: "The Board, as distinguished from the position of some of its members, has not included turnover as a factor in determining the appropriateness of [a] bargaining order remedy." ALJ Decision at 48 n.28. The Board adopted this conclusion without comment.

The circuit courts have reached divergent conclusions as to whether post-election events, including turnover, should be taken into consideration in determining the need for a bargaining order. *See Peoples Gas*, 629 F.2d at 45 n.18, 47-48; Note, *"After All, Tomorrow Is Another Day": Should Subsequent Events Affect the Validity of Bargaining Order?*, 31 Stan. L. Rev. 505, 512-21 (1979) (citing cases). Indeed, our own cases have not been wholly consistent. *Compare Creative Food Design*, 852 F.2d at 1302 (Board must always consider turnover before issuing a *Gissel* bargaining order), *Pedro's*, 652 F.2d at 1012 (Board must always consider conditions that exist at time it enters bargaining order), *and Peoples Gas*, 629 F.2d at 45-46 n.18 (same), *with St. Francis*, 729 F.2d at 856 (though precedents require Board to consider "specific significant events," court has "never . . . imposed a blanket requirement on the Board that it consider subsequent events before issuing a bargaining order").

In our most recent examination of this issue, in which we discussed *Gissel* orders generally, we concluded that the Board must consider turnover unless it finds that the employer's practices are particularly flagrant:

> [D]etermination of whether a *Gissel* order is necessary rests on consideration of both the nature and pervasiveness of the employer's misconduct as well as the amount of turnover. Where the Board finds

> that a practice is particularly pervasive or enduring, it need make only minimal findings that the effects have not been dissipated by subsequent employee turnover. Conversely, where the practices at issue are not especially pervasive or permanent in nature, the Board needs to make more careful determinations rspecting the effect of subsequent employee turnover.

Amazing Stores, 887 F.2d at 331. We then added, however, that

> [w]here the Board finds that employer misconduct is pervasive and likely to persist despite turnover, these conditions alone are sufficient to satisfy the turnover inquiry.

Id.

In *Amazing Stores*, we were dealing with a category I case. We spoke of the "extreme, pervasive, and entrenched character of the [employer's] misconduct," *id.*, and, borrowing the Supreme Court's characterization of category I in *Gissel*, we described its anti-union activities as "outrageous and pervasive." *Id.* at 329; *cf. Gissel*, 395 U.S. at 613. In the instant case, however, we are dealing with a category II situation, which the ALJ defined as a "less extraordinary case[] marked by less pervasive unfair labor practices which nonetheless have a tendency to undermine majority strength." ALJ Decision at 47. Based on this distinction, and in the interest of clarifying this area of our case law, we hold that before issuing a category II bargaining order, the Board must carefully consider employee turnover.

Thus, if on remand the Board continues to believe, in the light of our findings, that a bargaining order may still be indicated, it must take account of the turnover. Moreover, it must examine the turnover that has occurred up to the time it would issue the new order. As we explained in *Pedro's*.

> In considering whether a bargaining order may issue, . . . we emphasize that the Board must . . . consider the conditions in the bargaining unit at the time it renders its decision on remand. As stated by this court in *Peoples Gas*, "[w]e think it clear that no responsible decision-making body can formulate a reasonable remedy without taking into account conditions at the time its order is entered."

Pedro's, 652 F.2d at 1012 (quoting *Peoples Gas*, 629 F.2d at 45 n.18) (citations omitted). The question the Board will have to determine is whether the company's actions in the spring of 1987 left so lasting an imprint that a fair rerun election cannot be assured; or whether, to the contrary, "changes in the Company's work force have made a bargaining order now inappropriate, even if one might have been appropriate at some earlier time." *NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 9, 102 (2d Cir. 1982) (per curiam).

(iii) Reasoned explanation

In *Peoples Gas*, we refused to enforce a bargaining order for want of a reasoned justification. We explained:

> Before the Board is entitled to the considerable respect and deference with which we normally approach any review of its choice of remedy, its orders must reflect a responsible exercise of discretion and clearly articulate the basis for its decision. A remedial order should recognize the competing considerations which are potentially affected by the remedy chosen, be grounded in factual determinations rather than speculation, and explain how, in light of present circumstances[,] its remedy can be expected to effectuate the purposes of the Act.

Peoples Gas, 629 F.2d at 45 (footnote omitted). We went on to hold that

> before we will enforce a bargaining order, we must be able to determine from the Board's opinion (1)

> that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act, (2) why it concluded that other purposes must override the rights of the employees to choose their bargaining representatives and (3) why other remedies, less destructive to employees' rights, are not adequate.

Id. at 46; *see also Amazing Stores*, 887 F.2d at 330-31 (applying same factors).

Here, the ALJ briefly discussed the first two factors. He acknowledged in passing that a secret ballot election is the preferred measure of employee choice; and with respect to the "other purposes" that he believed should override the Avecor employees' section 7 rights, he detailed the company's violations and their potential impact on the employees' freedom of choice. (He made no mention, however, of turnover, in fact, he refused to accept evidence on the subject.)

As to the inadequacy of traditional remedies, the ALJ wrote:

> Considering the total circumstances of this case and all those factors noted above regarding the small size of the unit, the unlawful discharge of two employees, the likely impact of all the unlawful conduct on unit employees, and the fact that much of the unlawful conduct was committed by high Respondent officials, I find that it is improbable that the use of traditional remedies here would be sufficient to ensure a fair rerun election.

ALJ Decision at 50. This is a promising topic sentence; unfortunately, no elaboration follows. The ALJ never explained why the cloud created by these violations was likely to linger. He pointed to no evidence, for example, that th managers would resume their anti-union practices. *See Amazing Stores*, 887 F.2d at 331. He never explored the possibility that other remedies might cleanse

the environment enough to permit a fair election. Instead he offered only "conclusory statements that a fair rerun election cannot be held." *St. Agnes*, 871 F.2d at 148. We require a more comprehensive accounting.

The need for a real demonstration of the inadequacy of alternative remedies is particularly acute, of course, in a case such as the present one, where the Board relies on a weakly supported inference for its belief that the unfair practics undermined the election that immediately followed them. If the basis for thinking that the unfair labor practices affected that election is weak, a claim that they would fatally contaminate a new election months or years later is even weaker.

Our insistence on a full explanation is not the caprice of one crotchety circuit. As we pointed out in *St. Agnes*, *id.* at 149-49, other courts are equally adamant that a bargaining order must be accompanied by something meatier than "because I say so." *See, e.g., M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883, 888-89 (6th Cir. 1990) (remanding with instructions not to issue bargaining order where Board failed to provide requisite analysis); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1159-60 (7th Cir. 1990) (remanding where Board failed to explain why traditional remedies would be inadequate); *NLRB v. American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1247-49 (1st Cir. 1982) (remanding with instructions to hold election where Board failed to explain why fair election was unlikely); *see also NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 111-12 (2d Cir. 1984) (vacating bargaining order without remand where Board provided only conclusory analysis); *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838, 841-42 (4th Cir. 1982) (same); *NLRB v. Gibson Prods. Co.*, 494 F.2d 762, 766-70 (5th Cir. 1974) (same); T. Kheel, *Labor Law* § 15.05, at 15.41 n.14 (1989) (citing additional cases).

The courts have imposed these requirements because of the Board's evident partiality for bargaining orders. *See*

NLRB v. J. Coty Messenger Serv., 763 F.2d 92, 101 (2d Cir. 1985). We emphasize once again that a bargaining order is not a snake-oil cure for whatever ails the workplace; it is an "extreme remedy," *St. Agnes*, 871 F.2d at 147, that must be applied with commensurate care. By requiring specific findings, the courts try to keep the Board from overprescribing.

III. Conclusion

All violations except the Hamby termination rest on substantial evidence. The Board must more fully explain its interpretation of the parties' bargaining-unit stipulation, particularly the apparent deviation from Board precedent; and it must decide whether the disputed employees belong in the unit. If the Board wishes to stand by its decision to issue a bargaining order, it must accept evidence on employee turnover that has occurred up to the time it issues the order, and explain convincingly why the turnover has not cleared the air of the unfair practices and why traditional remedies could not reasonably ensure a fair election.

Accordingly, we enforce the Board's order in part, grant the petition for review in part, vacate the bargaining order, and remand to the Board for proceedings consistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1643

AVECOR INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed July 3, 1991]

Intervenor's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1643

AVECOR INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: Buckley, Williams and Thomas, Circuit Judges

ORDER

[Filed July 3, 1991]

Upon consideration of intervenor's petition for rehearing, filed June 10, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1643

AVECOR, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OIL, CHEMICAL, AND ATOMIC WORKERS
INTERNATIONAL UNION,
Intervenor.

REVISED JUDGMENT

[Filed July 25, 1991]

Before: BUCKLEY, WILLIAMS and THOMAS, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Avecor, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on September 22, 1989, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on October 30, 1990, and has considered the briefs and transcript of record filed in this cause. On April 26, 1991, the Court being fully advised in the premises, handed down its opinion granting in part and vacating in part enforcement of the Board's Order and remanding the case to the

Board for further proceedings consistent with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Avecor, Inc., Vonore, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees because they join, support, or assist Oil, Chemical, and Atomic Workers International Union (hereinafter called the Union) in order to discourage the membership in, support, or assistance of the Union by its other employees.

(b) Implying to employees that it would consider granting them wage increases to induce them to forego their union activity.

(c) Threatening employees that it will close its doors if they select the Union to represent them.

(d) Interrogating its employees concerning their union membership, activities, and desires.

(e) Threatening its employees with more strict rule enforcement and the refusal to grant future favors if they select the Union to represent them.

(f) Promising its employees more raises and benefits if they do not select the Union to represent them.

(g) Offering employees money or other benefits to induce them to seek the return of their union authorization cards.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Jeffery Tidwell full and immediate reinstatement to his former job or, if that job no longer

exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed and make him whole in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy" for any loss of earnings he may have suffered by the reason of the discrimination against him.

(b) Expunge from its files any reference to the discharge of Jeffery Tidwell and notify him in writing that this has been done. Avecor may, however, issue him a retroactive letter of reprimand, *see* Administrative Law Judge Opinion at 27, and amend its files to reflect that fact.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Post at its Vonore, Tennessee place of business copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 10 of the National Labor Relations Board (Atlanta, Georgia), shall be posted by Petitioner immediately upon receipt thereof, and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken no comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case is remanded to the Board for further proceedings consistent with the Court's opinion.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING IN PART, DENYING IN PART AND REMANDING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT imply to our employees that we will consider granting them a wage increase to induce them to forego their union activity on behalf of Oil, Chemical and Atomic Workers International Union.

WE WILL NOT threaten employees that we will close our doors if they select the union to represent them.

WE WILL NOT interrogate our employees concerning their union membership activities and desires.

WE WILL NOT threaten our employees with more strict enforcement of rules and the refusal to grant future favors if they select the Union to represent them.

WE WILL NOT promise our employees more raises and benefits if they do not select the Union to represent them.

WE WILL NOT offer employees money or other benefits to secure the return of their union authorization cards.

WE WILL NOT discharge or otherwise discriminate against employees because of their union activities and sympathies.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jeffery Tidwell immediate and full reinstatement to him former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL expunge from our files any reference to the discharge of Jeffery Tidwell and notify him in writing that this has been done.

AVECOR, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Mariotta Street, N.W., Suite 2400, Atlanta, GA 30323-2400. Telephone: (404) 331-2006.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1643

AVECOR INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: Buckley, Williams and Thomas, Circuit Judges

ORDER

[Filed July 25, 1991]

Upon consideration of the proposed judgment submitted by respondent on May 8, 1991 it is

ORDERED by the Court, that the proposed judgment, as revised, is adopted by the Court and the Clerk is directed to file same.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 10-CA-22645
10-CA-22886
10-RC-13942

AVECOR, INC.

and

OIL, CHEMICAL AND ATOMIC
WORKERS INTERNATIONAL UNION

DECISION AND ORDER

On September 30, 1988, Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief, and the Charging Party filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs [1] and has decided to

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[1] The Respondent has requested oral argument. The request is denied, as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent filed a motion to strike the Charging Party's exceptions, with supporting brief, contending that the Charging Party's exceptions lack the specificity required by Sec. 102.46 of the Board's Rules and Regulations. Although the Charging Party's exceptions do not conform exactly to the requirements of Sec. 102.46, they are not so deficient as to warrant striking. Thus, the motion is denied.

affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Charging Party excepted only as follows. It excepted to the judge's failure to find that the Respondent's president, Leonard Klarich, violated Sec. 8(a)(1) of the Act by making a preelection statement to employees that he would delay moving a machine into the plant until he knew where the Company stood with the union situation and its operating costs. It also excepted to the judge's failure to find that the Respondent's discharge of employee James Ricky White was a violation of Sec. 8(a)(3) of the Act. The General Counsel did not file any exceptions to the judge's decision.

The Respondent excepts, inter alia, to the judge's findings that lab secretary Diane Byrum is an office clerical and thus would be excluded from the collective-bargaining unit. In light of our agreement with the judge's finding that the Union had obtain majority status on April 27, 1987, with valid authorization cards from 19 employees out of a unit of 34, and because Byrum's inclusion in the unit would not affect that majority, we find it unnecessary to pass on Byrum's status.

On further consideration, we withdraw, as improvidently granted, our granting of the Respondent's motiont to correct transcript. Our granting of the motion on December 13, 1988, changed from a "yes" to a "no" President Klarich's response to the question whether he promised the employees more raises in the future without a union. However, the Respondent in its motion to the Board, failed to apprise the Board that the issue of correcting the transcript in this regard was, in substantially the same manner, raised before the judge and denied (see fn. 9 of the judge's decision). We find this motion was improvidently granted and, on further consideration, it is denied.

Moreover, with regard to this point, the judge found that employee Darrell Martin, a credible witness, testified that Klarich said the employees would be getting more "pay wages" in the future without the Union. Thus, in any event, we would find, based on Martin's testimony, that Klarich made the statement in issue.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Avecor, Inc., Vonore, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 22, 1989

JAMES M. STEPHENS, Chairman

JOHN E. HIGGINS, JR., Member

DENNIS M. DEVANEY, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Cases 10-CA-22645
10-CA-22886

AVECOR, INC.

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION

and

Case 10-RC-13492

AVECOR, INC.

Employer

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION

Petitioner

Josephine S. Miller, Esq., for the General Counsel.

Jeffrey M. Mintz and Ann Hale-Smith, Esqs., (Jackson, Lewis, Schnitzler & Krupman) of Atlanta, Georgia, for the Respondent-Employer

Lynn Agee, Esq., (Gerber, Gerber & Agee) of Nashville, Tennessee, and Mssrs. John Williams and Jim Hendrix of Knoxville, Tennessee, for the Charging Party-Petitioner.

DECISION

Statement of the Case

HUTTON S. BRANDON, Administrative Law Judge. These cases were tried at Knoxville, Tennessee on January 11-14 and May 31-June 1, 1988. The charge in Case 10-CA-22645 was filed by Oil, Chemical and Atomic Workers International Union, herein called the Union, on July 1, 1987,[1] and amended o August 13 while the charge in Case 10-CA-22886 was filed by the Union on September 28 and amended on November 2. The initial complaint in Case 10-CA-22645 issued on August 14. The petition in Case 10-RC-13492 was filed by the Union on April 30 seeking an election among employees of Avecor, Inc., herein called Respondent or the Company, in a unit of production and maintenance employees. Following a Stipulation for Certification Upon Consent Election approved on May 21 an election was held on June 25 in the stipulated unit. A majority of valid ballots cast opposed representation.[2] The Union filed timely objections to the election on July 1. On August 18 an order directing hearing on the objections and consolidating them with Case 10-CA-22645 issued. On October 15 an amended consolidated complaint issued, and on November 5 a second amended complaint and order issued consolidating Case 10-CA-22886 with the two previously consolidated cases. The consolidated complaint, as amended, alleges violations of Section 8(a)(1), and (3) of the National Labor Relations Act, as amended, herein called the Act, and presents issues regarding whether Respondent (a) independently violated Section 8(a)(1) of the Act through coercive conduct and statements of its supervisors and agents designed to dissuade employees from union support, (b) discharged

[1] All dates are in 1987 unless otherwise stated.

[2] Of approximately 40 eligible voters 10 cast votes for and 22 against the Union. There were 5 challenged ballots and no void ballots. Challenges were insufficient to affect the election results.

five employees in violation of Section 8(a)(3) and (1) because of their union activity, (c) interfered with the conduct of the election on June 25, and (d) if Respondent's conduct interfered with the election, a fair rerun election is impossible thus warranting the entry of a remedial bargaining order based on the Union's majority status established through authorization cards.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union and Respondent, I make the followig:

Findings of Fact

I. Jurisdiction

Respondent is a California corporation with an office and place of business at Vonore, Tennessee where it is engaged in the production of color pigment for plastic. During the calendar year preceding issuance of the consolidated complaint Respondent sold and shipped finished products valued in excess of $50,000 from its Vonore, Tennessee facility directly to customers located outside the State of Tennessee. The consolidated complaint alleges, Respondent admits, and I find that Respondent has been at all material times an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Complaint also alleges, Respondent further admits, and I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

Exactly when in 1987 that employees began discussing among themselves the desirability of union representation is not clear from the record. They were no strangers to union activity since they had experienced a union organi-

zational campaign by the United Steelworkers Union in 1986, and had rejected representation then in an NLRB conducted electon. Jeff Tidwell, one of the alleged discriminatees in the cases sub judice, testified regarding the most recent union campaign that he first began talking about union organization on April 22 or 23. He identified other employees with whom he discussed this topic, as James "Bucky" Rodgers, Tim and Stephen Lenoir, John Armstrong, and Darrell Martin. Both Armstrong and Martin are also alleged in this case to have been unlawfully discharged. The first overt step taken to establish contact with the Union was claimed by Tidwell. That first step, obtaining a telephone number for the Union, allegedly led to a series of unlawful acts attributed to Respondent's supervisors and agents as detailed below.

B. *The Alleged Independent Violations of Sections 8(a)(1) of the Act*

1. The Alleged Coercive Conduct of Supervisors.

a. *Sandy Thomas*

Sandy Thomas is employed as a quality control supervisor and at all relevant times was the immediate supervisor of Tidwell. Her supervisory status within the meaning of Section 2(11) of the Act was admitted by Respondent as was that of all supervisors alleged in the complaint to have violated the Act. The complaint alleged that Thomas on April 27 threatened employees with reprisals if they joined or engaged in activities on behalf of the Union.

The General Counsel relied upon the testimony of Tidwell to establish the only violation of the Act attributed to Thomas. According to Tidwell he went into the plant's laboratory office on April 23 at the request of other employees to obtain the Union's telephone number. Thomas was present as were employees Mac Coley and

Kevin Newman. Thomas inquired if she could help him, and Tidwell expressed doubt that she could help him in looking for the number he wanted. She asked what number he was looking for, and he replied he was looking for a number for the Union. After he had found the number she asked "who was it" and Tidwell replied that it was the Oil, Chemical and Atomic Workers Union.

Using the number obtained by Tidwell, Rodgers telephoned the Union and arranged a meeting between union officials, including District Director John Williams and representative and organized Jim Hendrix, at a local service station in Vonore around midnight on April 24. At the meeting which took place after conclusion of Respondent's second shift Williams and Hendrix discussed organization with approximately 10 employees attending the meeting. Many including Tidwell signed union authorization cards.

On Monday April 27, Tidwell reported to work on his normal shift, the second, shift, which began around 4:30 p.m. Shortly after reporting, according to Tidwell, Thomas approached him in the "prep room," where she told him, in the absence of any witnesses, "we" know all about it, and "you better be careful, better watch out." No further remarks were attributed to Thomas on this occasion.

Thomas in her testimony for Respondent specifically denied the remarks claimed by Tidwell to have been made by her on both April 23 and 27. She further denied any knowledge of union activity by Tidwell on either of those dates. She did concede, however, that she had a conversation with Tidwell alone on April 27 regarding misconduct attributed to Tidwell at work on April 24 which will be discussed in more detail below. In the course of that conversation Thomas testified she warned Tidwell about his conduct April 24 after he failed to deny the conduct attributed to him and in fact apologized for it. Thus, in this context Thomas admitted warning Thomas. Thomas

struck me as earnest, candid, fair, and honest. She testified that she regarded Tidwell as a friend, and her past conduct demonstrates leniency as well as fairness toward Tidwell which substantiates the existence of a friendly relationship between the two. Her testimony as a whole was both plausible and logical and her frankness was evidenced by a major admission that she had heard rumors regarding union activity in the plant during the week prior to the April 24 Union meeting. Having made that admission there would be little reason to further conceal specific knowledge of Tidwell's involvement in union activity if she in fact had such knowledge[3] and sought to warn him about it. Moreover, the verbal warning she in fact issued to Tidwell was as consistent with his alleged misconduct on April 24 as it was with his involvement in union activity.

Tidwell was alleged as a discriminates in this case and cannot be regarded as anymore disinterested in its outcome than Thomas. On the whole his memory impressed me as selective recalling only the details more supportive of his case. Moreover, notwithstanding his having given three different statements to the Board during the investigation of this matter in none of them did he attribute to Thomas the questions on April 23 he claimed in his testimony. On balance I find Thomas was the more reliable and credible of the two witnesses. Accordingly, I credit Thomas and conclude that any warning issued by her to Tidwell on April 27 related to his actions at work on April 24 and not his union activities. I therefore find no unlawful threat in Thomas' remarks and consequently no violation of Section 8(a)(1) of the Act in this regard.

b. *Denver Millsaps*

The complaint alleges that on or about April 24 Respondent's production manager, Denver Millsaps, prom-

[3] In emphatically denying that she had an exchange with Tidwell on April 23 regarding the Union's telephone number Thomas related she did not inquire of employees about personal telephone calls.

ised employees unspecified benefits if they refrained from joining or engaging in activities on behalf of the Union. In support of this allegation alleged discriminatee Leroy Hamby testified that on April 27 he was sweeping out Millsaps' office following a called early afternoon meeting of supervisors. Hamby asked Millsaps what the meeting was about and Millsaps replied that at the meeting they had discussed giving the operators $8.00 per hour to keep the Union out. Hamby, a janitor, asked if they had said anything about his rate of pay. Millsaps answered that he was not Hamby's supervisor and Hamby would have to take it up with his own supervisors. Hamby conceded he never thereafter talked to his own supervisor, maintenance manager Larry Murphy, about a raise.

Millsaps denied the statement claimed by Hamby. While he admitted attending a supervisory meeting where the Supervisors were advised by plan Manager Larry Willoughby of the existence of Union activity in the plant he could not recall the date of the meeting. And, although he recalled discussing with some leadmen the possibility of a wage increase to employees as a result of cutting production costs and staffing, he could recall no remarks made to Hamby along these lines.

Hamby's testimony was straightforward and unequivocal. He was specific where Millsaps was not. Millsaps' denials regarding the substance of Hamby's testimony were generally couched in terms of absent recall. Respondent argues that Millsaps was a veteran of the Steelworkers' union campaign the year before and having been instructed regarding lawful statements would not likely have made the the statement claimed by Hamby. I have considered this argument full well but find that it does not sufficiently counterbalance the persausiveness of Hamby's testimony.

Hamby's testimony regarding the date of remarks attributed to Millsaps is of questionable accuracy in light of Hamby's inaccurate testimony that he signed a union

authorization card on April 24 when in fact he signed the card on April 27. However, given Hamby's persuasiveness, I believe the inaccuracy of the date of the comment attributed to Millsaps is insufficient to discount the reliability of Hamby's testimony. I credit Hamby over Millsaps, and based on the record as a whole, it is reasonable to infer that the supervisory meeting Millsaps referred to took place April 27, since Respondent concedes it became aware of union activity on that date. Millsaps remarks clearly implied Respondent's willingness to consider the grant of an unlawful increase to its operators to thwart their union inclinations. Further, since Millsaps did not indicate that the idea of a wage increase was rejected, a listening employee received the clear message that abstention from union activity might well be rewarded and would thereby be discouraged from union support. Accordingly, I conclude Millsaps remarks to Hamby amounted to an implicit promise of benefit which violated Section 8(a)(1) of the Act as alleged.

c. *Joe Ingram*

Joe Ingram was employed by Respondent at all material times as the manager of liquid production. The complaint alleged that he committed a number of violations of Section 8(a)(1), the first of which occurred on April 24. On that date Ingram allegedly interrogated employees concerning their Union activities and desires, solicited employees to report union activities of other employees and threatened employees with discharg for union activity. The General Counsel relied upon the testimony of alleged discriminatee John Armstrong to substantiate these allegations.

Armstrong testified that on April 24 [4] at around 12:30 to 1:00 p.m. he was approached by Ingram while Arm-

[4] It should be noted that the date on this incident claimed by Armstrong would establish Ingram's alleged conduct as occurring prior to the first union meeting and Armstrong's signing of a union card.

strong was near the trash dumpsters. Ingram asked Armstrong if he had signed a union card. Armstrong replied that he had not. Ingram then remarked that if Armstrong knew anybody that signed a Union card, "it's best for you to go up and tell" Plant Manager Willoughby about who signed. Ingram added that if Willoughby ever found out that "you had anything to do with signing a union card he would fire you over it."

Ingram denied the remarks attributed to him by Armstrong. On balance, I credit Ingram's denials. Armstrong impressed me as an opportunist willing to testify to anything he deemed might be supportive of his claim of unlawful discrimination. His memory was highly selective at times. His placing of Ingram's alleged remark prior to the union meeting of April 24 and before any cards were signed exemplifies not only the inaccuracy of his recall but also a clumsy fabrication. Even his recall concerning the circumstances of signing a union authorization card was poor and contradicted by Ed Hurst, the employee who Armstrong claimed solicited his signature on the card. I find Armstrong's testimony to be totally self-serving, unreliable, and incredible. Accordingly, I find Ingram did not talk to Armstrong regarding the Union and did not commit the 8(a)(1) violations claimed by Armstrong.

An alleged threat of discharge by Ingram on May 13 was also claimed in the complaint, but the testimony in support of the allegation, that of alleged discriminatee James White, placed Ingram's alleged coercive remark around May 8, the same time as a threat of plant closure by Ingram also alleged in the complaint. Thus, White testified that on the day before he began a 2 week vacation on May 9 Ingram, White's supervisor, called White into his office and advised him of a 50-cent per hour raise.[5] In further remarks to White Ingram said that

[5] The raise was given White as a result of an annual review and appraisal.

Respondent did not want a union in the plant and that if a union did come in they would just close the doors, change the name of the company and hire all new people.

White testified that Ingram repeated these remarks on the day he returned from his vacation, apparently around May 25, when Ingram again called White into his office to advise him of a 40-cent per hour general wage increase to employees. Moreover, still according to White, Ingram explained that the 40-cent raise was not supposed to be a bribe against employees organizing but conceded that in fact it was and cautioned White to be quiet about it. Ingram noted that with the 50-cent annual raise and the 40-cent general raise White was "doing real good." The complaint alleges, and the General Counsel argues that Ingram's concession that the 40 cent raise was a bribe was coercive and independently violative of Section 8(a)(1). Further the 40 cent raise, which was in fact granted employees on May 14, and which is discussed in greater detail below, was alleged in the complaint as violative of Section 8(a)(1) of the Act because it was allegedly responsive to the employees union activity.

Ingram admitted to having had conversations with White regarding both the annual raise granted White and the second general wage increase. Moreover, he admitted that in the conversation with White on May 8 the subject of the Union was raised by White's assertion that he had been told that if the Union came in and there was a strike there was no way employees could lose their jobs. Ingram testified he responded by saying that the Respondent could hire replacement workers and "continue its normal work process." White asked what happened when the strikers came back to work and Ingram explained that if "somebody has your job that was temporarily filled during the strike" they still have the job and would be replaced by former strikers only after they quit or transferred to another job. Ingram testified parenthetically that he had received instructions regarding

strikers' rights and other labor relations laws in a meeting with Respondent's attorneys earlier in the day on May 8. Ingram denied that in talking to White regarding the general wage increase he had conceded that it was really a bribe.

Weighing the testimony of White against that of Ingram, I credit the latter in this instance. White provided no context in which the remarks attributed to Ingram occurred during the May 8 meeting when wages were discussed. And Ingram's testimony that the subject of the Union was broached by White in the context of a question about striker reinstatement rights was not rebutted by White. Moreover, White appeared to be testifying regarding his personal conclusions regarding the statements attributed to Ingram rather than Ingram's actual remarks, particularly with respect to the claim that Ingram said that the general wage increase was really a bribe to forego union activity after initially saying it was not. If Ingram was determined to convey to White the fact that the general wage increase was a bribe there was little reason for him to preface the message with a denial that the increase was a bribe. Finally, as discussed infra, the fact of a general wage increase, although not the amount was announced prior to the union campaign. This being the case Ingram would not have had a factual basis for saying the raise was in reality a bribe. Considering the above, as well as Ingram's convincing denials, I credit Ingram and find he did not violate Section 8(a)(1) of the Act in comments to White.

Alleged discriminatee Leroy Hamby also attributed an unlawful remark to Ingram. The remark took place, according to Hamby, in Ingram's office. Hamby placed the date initially as April 24, but subsequently indicated it was on April 17. Hamby was positive that the remarks he attributed to Ingram took place prior to the Union meeting at the Vonore service station on April 24. In

any case, Hamby related that he had asked Ingram what the thought about the Union, and Ingram responded that the Union would cause the company to close the doors and that it would do no good.

Ingram could recall no discussion regarding the Union with Hamby on April 24 and denied speaking to Hamby at any other time about the Union. As already indicated I was favorably impressed with Hamby's apparent truthfulness. His claim, however, that Ingram's remark took place about 2 weeks prior to 1 May suggests clear error on Hamby's part since there were no steps taken to contact a union prior to April 23 or 24. On the other hand, however, Hamby's testimony is consistent with supervisor Thomas' concession that she had heard rumors regarding union activity during the week before April 24. Hamby's broaching of the subject of the Union to Ingram prior to the union meeting on April 24 would not therefore be unreasonable or implausible. Moreover, if Hamby was inclined to fabricate the remark attributed to Ingram to bolster his claim of unlawful discrimination it is more likely he would have placed the time of the remark closer to his discharge and after he signed a union card. He did not do so. All things considered, and because in demeanor Hamby impressed me as one of the most truthful witnesses testifying in this proceeding, I credit Hamby over Ingram and find that Ingram made the remarks regarding plant closure claimed by Hamby and I find that such remark violated Section 8(a)(1) as alleged. In reaching this conclusion I have fully considered Respondent's contention that Ingram would not have made the remark Hamby claims because he receievd specific training by Respondent's attorneys' against such remarks. However, such training did not take place until May 8 more than 2 weeks after the remark to Hamby. While Ingram was employed during the union campaign among Respondent's employees by the Steelworkers the preceding year, the evidence indicates he was not a

supervisor at that time and received no special precautionary training as a supervisor which would enable him to recognize the coercive and unlawful nature of the comment attributed to him by Hamby.

d. *Larry Willoughby*

According to the complaint, Plant Manager Larry Willoughby was involved in a number of infractions of Section 8(a)(1) of the Act. Several witnesses testified regarding these infractions. Three such witnesses, Darrell Martin, James White, and Ed Hurst, related that Willoughby had interrogated them regarding their union activity. Thus, Martin testified that around April 27 or 28 Willoughby talked to Martin in the production area of the plant and asked him if he knew anything about "this Union." Martin said he didn't want to talk about it. Willoughby persisted and asked Martin if he was for it or against it, and Martin finally replied with a crude and vulgar analogy indicating his support of the Union. White attributed no specific response by Willoughby to the analogy and Willoughby thereafter left the area.

Willoughby, testifying for Respondent could recall no conversation with Martin about the Union and could not recall the analogy Martin claimed he used in the conversation.

Martin's testimony was positive and was persuasively delivered. Willoughby's testimony, on this point was responsive to questions framed in terms of whether he recalled the exchange claimed by Martin. Thus, Willoughby on this point was less convincing than Martin. Crediting Martin I conclude Willoughby did unlawfully question him regarding the Union in violation of Section 8(a)(1) as alleged.

Another instance of unlawful interrogation was attributed to Willoughby by employee Ed Hurst who testified that during the work week following April 24, the

date he signed a union authorization card, he asked to talk to Willoughby. The two engaged in conversation on the plant floor where Hurst told Willoughby that he was depressed and fearful that he might be laid off like Lionel Smith, a former supervisor of Respondent, and John Armstrong, an alleged discriminatee in this case.[6] Willoughby told Hurst that as far as he was concerned Hurst was not going to be laid off or fired and added that Hurst was a good worker whose work warranted no complaints from Willoughby. However, Willoughby asked Hurst if he had gone to the Union meeting and Hurst admitted that he had. Willoughby also asked Hurst if he had signed a union authorization card, and Hurst answered affirmatively.

A slightly different version was related by Willoughby who testified that it was Hurst who initially mentioned the Union. Thus, when Willoughby asked what was bothering Hurst to cause his depression Hurst responded that he was mixed up in this "union thing." Willoughby admittedly then asked Hurst what he meant and whether he had signed a union card. Hurst replied that he had signed a card and was fearful that he would lose his job. Willoughby then said Hurst was a good worker and gave him assurances against being fired.

It is clear that Hurst initiated the conversation with Willoughby because of his concern for being fired. Under these circumstances I find Willoughby's version of the conversation entirely plausible and believable. His candid admission that he inquired whether Hurst had signed a union card enhances that version. I credit that version and find Hurst initially indicated to Willoughby an involvement in union activity as a basis for his concern about being fired. In view of this revelation Willoughby's subsequent question about Hurst's signing a card did not

[6] In light of the reference to John Armstrong who was discharged on April 29 the exchange between Hurst and Willoughby must have been after April 29.

tend to be coercive. See *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). See also *Premier Rubber Co.*, 272 NLRB 466 (1984). Moreover, and in any event, any coerciveness was dispelled by Willoughby's added assurances against reprisal. Accordingly, I find no violation of Section 8(a)(1) in this incident.

A final instance of unlawful interrogation alleged in the complaint and attributed to Willoughby was revealed in the testimony of White. White placed the event about 5 days prior to the June 25 election and testified that Willoughby talked to him at his work station where Willoughby asked how he felt about the Union and if he had signed a union card. White replied that he didn't know "a whole lot" about the Union and untruthfully told Willoughby that he had not signed a union card.

Willoughby flatly denied that he had asked White how he felt about the Union and explained that White had made it evident how he felt "by his actions throughout the plant," making unnecessary any question about White's union inclinations. However, Willoughby failed to detail what White's actions prior to the time of the alleged questions were which indicated his union support. While White served as an observer for the Union during the election there was no evidence that Willoughby was aware of his designation as an observer more than a day or two prior to the election.

I was impressed with White's sincerity if not the total accuracy of his recall. I do not believe the question attributed to Willoughby, even though devoid of context, was a product of his imagination, and Willoughby's failure to detail the manner in which White demonstrated his union support prior to the time of the alleged questions undermines credence of his denials of the alleged question. Moreover, the question attributed to Willoughby is consistent with his questioning of Martin noted above.

Accordingly, I credit White and find that since it was not established that White had overtly displayed his union support prior to that time Willoughby's question of White violated Section 8(a)(1) as alleged.

Martin and Hurst also testified in support of complaint allegations that Willoughby threatened employees with more onerous working conditions due to union activities, threatened employees with reprisals, a curtailment of operations, and a loss of benefits if employees engaged in union activities. Martin's testimony was also relied upon by the General Counsel to support complaint allegations that Willoughby promised employees unspecified benefits for refraining from union activities and unlawfully solicited employees to withdraw their support for the Union and provided them assistance in this regard. Other witnesses corroborated various aspects of the testimony of Martin and Hurst and still others testified as to other conduct of Willoughby of the same nature.

Martin's testimony placed most of Willoughby's threatening remarks in a speech to assembled employees around 3:30 p.m. on or about May 14, when a general pay raise, also alleged to be unlawful and discussed further below, was announced. Martin related that at the employee meeting Willoughby told employees that they had a union they would be starting out on a minimum wage scale and they wouldn't have the right to speak to the "main people" like they had before. Further, Willoughby said that employee mistakes "wouldn't be let go as easy" so that if employees "messed up" on their machines they would be "wrote up" a lot quicker than before the Union came in, and the foremen would be "hassling" them more.

Hurst was less certain about the date of the employee meeting at which Willoughby spoke but confirmed that Willoughby said if the Union came in they would start off paying minimum wage. He added that Willoughby said that all activity with respect to hiring people or bringing in new machines would be set aside until "all of

this was blowed over." Hurst also confirmed that Willoughby said that with the Union in supervisors would be more strict.

Willoughby admitted speaking to the assembled employees on May 14. He identified Leonard Klarich, president of Respondent, Ed Lale, Sr., executive vice president, and Robert McLean, senior vice president, as being present. He further admitted that the subject of the meeting was the union organizing campaign, and said Klarich made most of the presentation at the meeting stressing Respondent's position that employees did not need a union.[7] In this regard Willoughby testified with testimonial support from Klarich that Klarich brought employees up to date on Respondent's expansion efforts which were nearing completion. However, Klarich pointed out that plans to move a machine from Respondent's plant in Kansas City to Vonore were being held in abeyance until they could determine what their cost of operation would be in Vonore.[8] Regarding the reference to minimum wages, Willoughby testified he told employees that when you go to negotiations everything was up for grabs, that it was a big horse trade, that there was swaps and trades, that everything the employees had would be on the table, and the only thing guaranteed was that the federal government guaranteed that employees would be paid at least minimum wage. Regarding the other statements attributed to him, Willoughby said he could not recall any remarks about supervisors hassling employees but did tell employees that the mode of operation would change because a third party (the Union) would influence Respondent's decisions, that they had rules to go by and could not make

[7] Klarich, on the other hand, said Willoughby was the principal speaker.

[8] The machine was in fact moved from Kansas City to Vonore around 1 July. However, due to a mishap a portion of the shipment was damaged so that the machine was not installed and did not become operational in Vonore until much later.

exceptions to the rules, and to do otherwise would establish precedents that would haunt them later. He could recall no statements regarding employees getting more wage increases in the future without a union and denied saying that the Respondent would not allow a union.

Klarich generally supported Willoughby's testimony regarding the May 14 meeting, but appeared more vague in his recollections. However, he admitted that he had told employees that they would get more raises without a union.[9] McLean testified but did not address the remarks at the May 14 meeting. Ed Lale, Sr., admitted his attendance at the meeting but his recollection was clearly vague regarding what was said.

The frailty of human recollection is such that people frequently report their own conclusions regarding comments made to them or in their presence as the substance of the comments themselves. Moreover, individuals testifying about their own remarks often relate what they said or, at least, intended to say in more explicit language than that actually used. These tendencies make particularly difficult the determination of violations of Section 8(a)(1) of the Act which frequently turn on nuances in emphasis and the use of precise wording. This difficulty is exacerbated where only a few witnesses of a much larger group who heard the comments testify on the subject, and most of these cannot be regarded as unbiased. However, considering all the testimony on the May 14 meeting including admissions of Respondent's witnesses, and my sense of the record as a whole, I am persuaded that Willoughby told employees, as Martin and Hurst

[9] Respondent in its brief contradicts the record where it shows this admission by Klarich, and contends that its counsel's notes, attached to the brief, contradict the admission. There was no motion to correct the record filed and served on the other parties in this case, however. Accordingly, and in the absence of any agreement among the parties regarding any record changes, the record will stand in its present form.

testified, that employees' risked a return to minimum wage if the Union were elected. That is the clear message Willoughby intended to convey. However, I do not view that statement as unlawful in the context claimed by Willoughby, i.e. that it would have to be a product of negotiations, a context not clearly and credibly contradicted by any of the General Counsel's witnesses. I therefore find the statement did not violate Section 8(a)(1) of the Act.

I credit the testimony of Martin and Hurst to the effect Willoughby said Respondent would be more strict on employees if a union represented them. I find Willoughby's explanation of his version of the comment somewhat hollow and unconvincing and find that the listening employees received the intended message that there would be no exception to strict enforcement of rules that might "haunt" Respondent and that the lenient atmosphere then enjoyed would not survive union representation. I find Willoughby's remark to be a clear threat of more strict rule enforcement, and, accordingly, a violation of Section 8(a)(1).

In the absence of specific contradiction by Willoughby, and also because Klarich admittedly made a similar remark at the same meeting as discussed below, I also credit Martin's testimony that Willoughby said employees would get more benefits without a union. Accordingly, I conclude, as the complaint alleges, that Willoughby promised employees unspecified benefits in violation of Section 8(a)(1) of the Act.

Hurst's testimony regarding statements concerning the decision not to bring in a new machine was generally admitted by both Willoughby and Klarich. Thus, Klarich testified that Willoughby told employees that the determination regarding the transfer of new machinery from Respondent's Kansas City plant was being held in abeyance "until a determination was made, where we stood with the Union as far as operating cost." Willoughby's

version was that employees were told the movement of the equipment was "put in abeyance until we could determine what our operation mode and what our cost of operation was going to be in the Tennessee plant." Respondent argues that Willoughby's reference to holding the decision in abeyance did not constitute an unlawful threat because it was not union organization per se which was a determining factor, but rather operating costs which might be affected by contractual terms with the Union which was Respondent's concern. Moreover, Respondent's brief asserts that Willoughby's remarks were responsive to an employee question and it was not Respondent's intent to capitalize upon the point.

The existence of a violations of Section 8(a)(1) is not based upon Respondent's intent but rather upon whether Respondent's conduct may be reasonably construed as tending to coerce or restrain employees in the exercise of their Section 7 rights. Neither the actual effect of Respondent's conduct or the subjective response of employees is determinative. *NLRB v. Huntsville Mfg. Co.*, 514 F.2d 723, 724 (5th cir. 1975); *Island Creek Coal Co.*, 279 NLRB 858 (1986). However, Willoughby's reference to the operating costs of the new machine, a reference not specifically contradicted by the General Counsel's witnesses and therefore credited, reasonably tied the decision to defer installation of the new machine to economic factors potentially stemming from employee union representation rather to representation itself. Accordingly, and also because the evidence falls short of establishing that Respondent's decision to defer installation of the machine under consideration represented any risk to the job security or potential for advancement of any unit employee and therefore not likely to be viewed as threatening by employees, I find Willoughby's statement did not violate Section 8(a)(1) of the Act. *Cf. Pilot Freight Carriers, Inc.*, 223 NLRB 286 (1976).

White was apparently on vacation at the time of Willoughby's May 14 speech to employees, but he testified

to other remarks of Willoughby to assembled employees 2 to 3 days before the election. He testified Willoughby told employees not to expect any favors similar to those given in the past if the Union came in. White recalled still another meeting some three weeks before the election where Willoughby spoke. He identified President Klarich and Executive Vice President Ed Lale, Sr., as also being present. Since all three men spoke to the employees White was uncertain which one said it but testified "they" said he did not need a union to represent them, that Respondent didn't have to negotiate, that Respondent didn't have to do anything it didn't want to do, and that employees could go down to making $3.35 an hour.

Willoughby did not specifically respond in his testimony to that of White in the foregoing respects. I credit White here regarding the remarks attributed to Willoughby at the meeting 2 to 3 days before the election regarding not expecting favors. It is in keeping with those found to have been made at the May 14 meeting. I find the remark unlawful and violative of Section 8(a)(1), since the clear import was that past leniency for employees would be abolished if they selected the Union to represent them. I do not, however, credit White regarding the statements claimed to have been made 3 weeks prior to the election. White was unable to specifically identify who made the remarks thereby rendering unreliable his accuracy on what was said.

According to the General Counsel, White's testimony also establishes an unlawful solicitation of grievances by Willoughby at the meeting a few days before the election. White testified that at the meeting a dispute arose between Willoughby and White regarding the amount of a raise given White, and Willoughby told White to shut up. However, Lale directed Willoughby not to tell employees to shut up and added that he was there to hear the people talk. Lale said that if anybody had anything to say he wanted to hear it and asked employees if they had any

problems. White responded by noting that his problem was that his supervisor Joe Ingram would not speak to him at the time. Lale said he would have White and Ingram to get together to see what could be done. Since there is no evidence that Willoughby, as opposed to Lale, solicited any grievances of employees, at this meeting I must conclude that the Respondent did not through Willoughby unlawfully solicit grievances. The issue regarding such a violation attributable to Lale will be discussed below.

There, is little disupute concerning the allegation involving Willoughby's unlawful solicitation of employees to withdraw their union support. Martin testified, and Respondent concedes, that at the May 14 meeting with employees Willoughby distributed to all employees a "Notice" to employees with copies of a form letter to Union District Director John Williams attached along with an unstamped envelope addressed to Williams. The "Notice" related that a number of employees had asked what they could do about "cancelling out of the Union." The Notice further indicated that employees could try to cancel the Union obligation, and if they wanted to do it, and it was strictly up to them, they could write a letter to the Union like the one attached. The notice signed by Vice-President McLean and Willoughby requested that employees let them know if they had any other questions or needed their help. The attached letter addressed to union representative Williams stated.

> I am an employee of Avecor, Inc. I want to cancel my interest in and obligation to your union. I do not want to be a member of or represented by your union.

Martin testified that only employee Mac Coley asked any questions at the meeting regarding the "Notice" or withdrawal procedure. However, Martin did not specify the questions asked by Coley and related only that Coley expressed interest in the notice and attached letter.

In Mariposa Press, 273 NLRB 528 (1984), the Board, citing *R. L. White Co.*, 262 NLRB 575 (1982), stated at 529:

> An employer may lawfully inform employees of their right to revoke their authorization cards even if employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right or offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such action.

Here there was no evidence that in distributing the withdrawal letters Respondent sought to determine who would use them. Respondent did not ask for executed copies of the letters nor did it lend any further assistance in providing stamps or in mailing the letters. *Mariposa Press* would appear to be dispositive in finding the absence of any violation. Here there was no evidence Respondent attempted to ascertain who used the letter or offered assistance in executing or mailing the letters or otherwise suggested to employees that failure to use the letters would somehow put their jobs in jeopardy. Accordingly, I find no violation of Section 8(a)(1) with respect to distribution of the form withdrawal letters. See also *Brunswick Food and Drug*, 284 NLRB No. 78 (June 30, 1987).

Former employee Robby Belcher testified about an employee meeting at which Willoughby spoke and placed it 2 or 3 days before the election. He related that Willoughby said the Company didn't need a union, that employees would do better without a union, that the company would not allow a union, that he knew about unions and that they worked in the sixties but now they were no good.

I do not credit Belcher's testimony since he was an equivocal and uncertain witness who impressed me as

generally unreliable. Further, his testimony was not supported by any other witnesses. Accordingly, I find no violation of the Act by Willoughby based on Belcher's testimony.

e. *Ed Lale, Sr. and Leonard Klarich*

The complaint alleges that Respondent through Executive Vice President Ed Lale, Sr. on May 14 promised employees unspecified benefits if employees refrained from joining the Union, and that on June 22 he threatened employees with a loss of benefits if they joined or engaged in union activity and solicited grievances of employees to discourage their union activities. Counsel for the General Counsel relied upon Martin's testimony that Lale at the May 14 meeting told employees that the remarks of Willoughby already related above were true and added that employees would be getting more pay raises in the future without a Union. But Martin failed to testify regarding a June 22 threat of Lale and that allegation of the complaint was dismissed upon Respondent's motion at the conclusion of the General Counsel's case.

White did testify regarding solicitation of grievances by Lale at the June 22 meeting and as earlier noted herein responded to a request for problems by noting the failure of his supervisor, Ingram, to talk to him. Lale said he would have White and Ingram get together.

While Lale could recall meetings with employees prior to the election he could recall no specific meeting involving White. He could not recall asking employees regarding their problems, but noted that Respondent maintained an "open door policy" under which all employees could approach management regarding their problems. In view of the vagueness of Lale's testimony and his poor recall I credit White where he contradicts Lale. However, under the circumstance described by White I do not view Lale's remarks as establishing the unlawful solicitation of grievances. Rather, on White's testimony Lale's re-

marks appear to be a spontaneous response to Willoughby's effort to preclude White from speaking. In light of this, and in the absence of evidence contradicting the prior existence of Respondent's open door policy, as well as the fact that Lale did not expressly on implicitly promise to remedy any employee "problems," I find Lale did not unlawfully solicit grievances in violation of Section 8(a)(1) of the Act. See *Uarco, Inc.*, 216 NLRB 1 (1974).

One complaint allegation asserts that Klarich on May 14 promised employees unspecified benefits if employees engaged in union activities. The General Counsel relied upon Martin's testimony again to establish the violation, and Martin in a conclusionary manner related that Klarich simply agreed with Willoughby's remarks at the May 14 meeting and said that employees didn't need a union, that they would be better off financially without it, and that they would be getting more "pay wages" in the future without it.

Klarich, on the other hand, as already set out above conceded that he had told employees that they would receive more raises without a union. If Klarich's remark regarding future raises constituted only an observation that the May 14 wage increase was not the last and that there would be future increases when warranted even in the absence of union representation the remark might be considered lawful. But if the remark indicated that there would be additional raises if the Union were rejected as a quid pro quo for such rejection the remark constitutes unlawful interference as a promise of future benefits. Absent clarifying context other than Klarich's future concession that he advised employees of his antiunion position, I find the employees, as the General Counsel contends, likely received the unlawful implication in Klarich's statement. I therefore find the statement regarding the future raises violated the Act as alleged. Since the remedy for this violation would not be effected by a finding that Lale repeated the same remark I find it unnecessary to make any such finding regarding Lale.

Although not specifically alleged in the complaint the General Counsel in her brief pointed to the testimony of Robby Belcher arguing that it established that Klarich in a meeting with employees 2 to 3 days prior to the election told assembled employees that if the Union came in "they" could or would close the company down. Klarich's testimony contradicted Belcher's. Without regard to whether this issue was fully litigated by Respondent I do not credit Belcher's testimony wherever contradicted in the record, since I have found him to be unreliable and unworthy of belief. Moreover, there was absolutely no corroboration of his claims regarding Klarich's remarks. Thus, I find no unlawful threat to close by Klarich was established.

d. *Carl Farrell*

Farrell was employed by Respondent at all material times as a production supervisor. The complaint alleges that Farrell on May 25 solicited employees to withdraw their support for the Union and on May 24 threatened employees with discharge if they engaged in activities on behalf of the Union.[10] These allegations grow out of an alleged conversation between former employee Belcher, nonsupervisory quality control employee Mac Coley, employees Tim Lenoir, and Ed Hurst with Farrell in late May. Belcher's confusing testimony regarding the conversation follows:

> "We was just talking, you know, about Tidwell getting fired, and it didn't seem right cause he didn't have no writeups nor nothing. And that Mac Coley's, you know, he—him and Tidwell didn't get along too well anyway and he said that he felt—well, what I

[10] Two complaint allegations that Farrell solicited employees to report union activities of other employees and engaged in surveillance of employees' union activities were dismissed at the hearing upon motion of Respondent after the General Counsel's failure to produce evidence in support of the allegations.

heard was that Mr. Willoughby—was that he told Mr.—Mack told him if he could find anything on him to get rid of him because he was pushing him.

Q. [By Ms. Miller]. Now who said that?

A. Mac Coley.

Q. Okay. Mr. Coley said that Willoughby had said—

A. That's what we were talking about, I think, he was just, you know, talking.

Q. But Mr. Coley did say that?

A. Yes, mam.

Q. Did Mr. Coley say anything more about Tidwell's discharge?

A. He said he was the one that got rid of Tidwell. That he was the cause of Tidwell's getting fired.

Even after having his recollection refreshed by his prehearing affidavit and in spite of further leading questions Belcher failed to clarify Willoughby's, Farrell's or Coley's involvement in Tidwell's discharge. Asked what Coley had said about what he had done to get Tidwell discharged Belcher responded:

It was on account of him losing his cool—blowed his cool, couldn't handle his job. I don't think there was nobody that night that could have handled the job to tell you the truth.

After having his recollection refreshed by his affidavit again Belcher was asked whether any additional remark was made about the reason for Tidwell's discharge Belcher answered: "Because he [Coley] had pushed Jimmy [Tidwell] into—you know, he was pushing pretty hard." In essence then, Belcher testified that Coley was bragging that he had gotten Tidwell fired. Asked if Farrell said anything in the conversation Belcher said Farrell only

said he wasn't for the Union and Farrell and Coley both "sort of" asked him if he was for or against the Union. It was during this conversation that Coley, according to Belcher, said he'd give $50.00 for anybody's union card back and Farrell said he would too. While a witness herein, Hurst did not corroborate Belcher's testimony regarding the foregoing.

On cross-examination Belcher was asked what Farrell had said specifically regarding Tidwell's discharge. Belcher testified Farrell said Tidwell "got his own self fired," but then added that Tidwell could handle the job.

I find Belcher's testimony unreliable and insufficient to establish any threat of discharge for union activities on the part of Farrell implicit in any comments relative to Tidwell. Also, I find nothing credible in Belcher's testimony which would establish that Farrell created the impression of surveillance of employee union activity in the same conversation, as the General Counsel contends in her brief even though not specifically alleged in the complaint. Accordingly, I find no violation of the Act based on these contentions.

Farrell denied being present when Coley offered $50 to any employee for withdrawing their union card. He responded negatively when asked whether the "fifty dollars and the card issue" came up in any conversations between him and "any other employee besides" Coley. Because Farrell impressed me as generally more credible than Belcher I credit Farrell regarding the denial. However, as already noted Farrell's testimony establishes that he first heard from Willoughby about the $50.00 offer to any employee who could get their card back from the union and passed the offer on to Coley, a unit employee, prior to May 14. I find such conduct establishes a violation of Section 8(a)(1) of the Act, as the complaint alleges, whether or not either Farrell or Coley in Farrell's presence ever repeated the offer in the presence of Belcher.

2. The Agency Status of Mac Coley and the Coercive Conduct Attributed to Him.

The complaint alleges that Coley, notwithstanding the fact that he did not enjoy supervisory status, was an agent of Respondent and attributes to him the same unlawful conduct attributed to Farrell in the complaint as set forth above and occurring on the same dates. The evidence supporting the allegations is found in Belcher's testimony already related above. The General Counsel's theory, in which the Charging Party concurs, is that Coley was an agent of Respondent by virtue of his apparent involvement in the discharge of Tidwell at the direction of Willoughby. I find without regard to Coley's agency status that Belcher's confusing and conclusionary testimony is insufficient to establish that Coley did anything at the direction of Willoughby or Farrell to get Tidwell discharged or to constitute a threat of discharge to employees generally for union activity. Moreover, even if otherwise deemed sufficient to establish the complaint allegations on this point, I find Belcher's confused testimony unreliable and do not credit it.

3. The Alleged Unlawful Wage Increase

It is undisputed that Respondent gave its unit employees a general wage increase amounting to 50 cents per hour effective May 14. It is also undisputed that the Union was not notified in advance of the wage increase. The complaint alleged that the wage increase violated Section 8(a)(1) of the Act and the General Counsel argued that the increase was designed to dissuade employees from supporting the Union and constituted rank interference. It has long been held that grant of a general wage increase to induce employees to reject union representation violates Section 8(a)(1) of the Act. *See J. J. Newberry Co.*, 249 NLRB 991 (1980); *Robert's Inc.*, 236 NLRB 971 (1978). Here Respondent's wage increase was without apparent precedent. The grant of the in-

crease in the amounts and number to whom granted, coupled with the timing of the announcement after the start of the Union activity establishes a prima facie case that the increase was a direct response to the union activity and was designed to discourage it.

An employer in the face of organizing activity among his employees is required to grant or withhold benefits in the same manner and to the same extent it would have in the absence of such organizing activity. *J. J. Newberry Co.*, supra at 992. Respondent here defends on the contention that the wage increase was planned prior to the Union activity and was made possible as a result of economies accomplished by the change over from a three 8-hour shift operation per day to a two 10-hour shift operation on April 27. In this regard Willoughby, with support from Klarich testified that in the fall of 1986 Willoughby, a former plant manager at Respondent's Kansas City facility, recommended to Klarich that, consistent with the operation in Kansas City, Respondent implement two 10 hour shifts per day, 4 days a week, rather than the three-8-hour shifts, 5 days a week normally operated by Respondent at Vonore. Willoughby related that such a change would cut absenteeism and facilitate maintenance and shipping. Klarich was receptive and told Willoughby to explore it with the "people." Subsequently, Willoughby checked with supervisors and some employees who endorsed the proposal. Thereafter, toward the last of January or the first of February Willoughby discussed the matter again with Klarich this time coupling his proposals with the elimination of the two man operation of two 1-B Banbury machines. Going to a one man operation of the Banburys was consistent with the method of operation in Kansas City and could be accomplished as a result of expansion construction initiated the preceding December which would enlarge the platforms on which the Banburys were located to facilitate storage of materials near them and thereby eliminate the need for an extra

man to constantly resupply the machines.[11] Willoughby explained to Klarich that these changes would free two men for other productive work and allow the elimination of third shift supervision, all at savings to Respondent. Klarich agreed to the plan and told Willoughby that he would split any savings with the employees 50 50.

After ascertaining from the construction company doing the expansion work in late March or early April that the work would be completed in mid-April, Willoughby met with supervisors and announced that they would be changing to the two 10-hour shift system approximately April 27. He further advised them that there would be cost savings associated with the change which would be shared with employees on a 50 50 basis. However, for obvious reasons he did not announce that there would be any staff reductions associated with the move although it was contemplated that two supervisors would be terminated.

The shift operation changes, according to Willoughby, were announced to employees by Willoughby during the first week of April, along with a general announcement that savings accomplished would be split with the employees. On April 23 or 24 Respondent terminated two supervisors, Lionel Smith who generally ran the third shift although Respondent did not always operate a third shift, and Jack Million, a color room supervisor. No nonsupervisory employees were laid off. After the supervisors layoff was announced a notice was posted that the two 10-hour shifts, 4-day weeks, would begin operation on 27 April.

Respondent did not announce the amount of the wage increase, Willoughby testified, until May 14 because it was unclear what savings had been achieved with the changes. Moreover, Respondent had to ascertain from

[11] The [illegible] rotated with the machine operator, the record indicates [illegible] half the work time.

counsel whether the increase could be given in light of the union campaign. Further, there was a delay in announcing the increase and making it effective because, according to Willoughby, Klarich wanted to see if the new shift system worked. The raises were first reflected in the paychecks received by employees on May 21. The amount, 40 cents per hour for each unit employee, was computed based upon the savings from the salary of the two eliminated supervisors and the pay of the two Banbury support employees who were shifted to other productive work.

Willoughby's testimony in most of the foregoing respects was supported by Klarich, and employee Don Cordell who confirmed that employees had been told of the shift change and wage increase plan, but not the amount of the increase, before the construction was completed and the shift change implemented. Supervisor Ingram likewise supported Willoughby's contention that employees had been told that a wage increase would follow the change to the two 10-hour shift operation. Further, employee James Bucky Rodgers, one of the initiators of the union campaign who subsequently reversed his union support testified Willoughby announced to a meeting of second shift employees prior to implementation of the shift changes that there would be savings resulting from the changes and that Respondent would split them 50 50 with employees. Robby Belcher who I have previously found to be an unreliable witness testified on direct examination with uncharacteristic certainty and clarity that the employees had been promised the raise when the third shift was eliminated and even before employee talk about a union began.

From the foregoing testimony of Respondent's witnesses whom I credit on this point and considering the record as a whole, I conclude that Respondent had planned in advance of the union campaign to implement the new two shift operation. It obviously had discharged two supervisors in anticipation of the change and clearly had done

so before the union meeting on April 24 and probably before the Union had even been contacted. Moreover, it is incomprehensible that Respondent could have implemented a change in shift operation, on 27 April with all its attendants scheduling problems, simply as a response to a union meeting which took place at midnight on April 24. Since it must be concluded that the change was previously planned it must further be concluded that the reasons given for the change were reasonable and valid including the aim of accomplishing savings and the way such savings were to be accomplished. Under the circumstances, the willingness to split the savings with employees as a motivational device is understandable even where as Respondent admits, Respondent was generally operating at a loss. Finally, I am persuaded that Respondent had in fact announced prior to the union campaign that a general wage increase would be given, since I credit the testimony of Cordell and Rodgers in this regard. Cordell struck me as particularly forthright. Rodgers was less persuasive, and he obviously was intent on currying favor with Respondent by his overly eager contention that Willoughby announced, prior to the fact, the elimination of supervisors as a factor in the savings, an announcement Respondent's other witnesses denied. Accordingly, I find the grant of the wage increase announced on May 14 was consistent with Respondent's intention expressed prior to the union campaign, and was therefore not violative of Section 8(a)(1) of the Act.

C. The Alleged Violations of Section 8(a)(3) of the Act

1. The Discharges

(a) *Jeff Tidwell*

Tidwell was employed by Respondent in May 1985 and worked as a sample maker until he became a quality control trainee in January or February 1987. He was under the direct supervision of Sandy Thomas, but at the

relevant times herein he worked on the second shift when Thomas was not present although she could be contacted by Tidwell by telephone at her home in the event problems arose. As a quality control trainee it was Tidwell's function to inspect incoming pigments and outgoing products. He was further required to inspect products during the production process to insure color conformity of the product with customer requirements.

Tidwell's involvement in securing the Union's telephone number, his attendance at the union meeting in Vonore around midnight on April 24, and his signing of a union authorization card on that occasion has already been noted above. Tidwell also solicited employees Steve Smith to sign a union authorization card in the employee dressing room at the plant on April 27. While Tidwell identified supervisor Joe Ingram as being present in the dressing room along with employee Don Cordell on this occasion, there was no specific claim by Tidwell that Ingram either heard or observed the solicitation of Smith.

Other evidence of employer knowledge of Tidwell's union activities was claimed by Tidwell in comments he attributed to Darrell Akins and Sandy Thomas. Thus, Tidwell related that on April 27 Akins approached him and stated that he had heard the employees were going to go with a union. When Tidwell replied they were going to try Akins responded that he hoped they got it in.

Tidwell was discharged on April 28, Respondent claims, based on events which took place during the second shift at the plant on April 24. Tidwell testified that he was told that evening that Respondent had to start up a run of 40,000 pounds of material, a large order, which would be shipped out the following Monday. According to Tidwell, he had difficulty with the production that night and, after repeated checks and corrections, was never able to adjust the color of the product to acceptable conformity even after a telephone contact with Colleen Dannett, a quality employee Thomas had told him to contact if he had

problems. It was necessary for production to be halted while corrections were attempted and adjustments made by Tidwell to insure quality apparently causing some frustration on Tidwell's part and the creation of some tension between Tidwell and Supervisor Farrell whose primary interest as a production supervisor was in seeing that production was achieved. Tidwell's testimony did not address the details of this tension or the extent of any interchanges he had with Farrell regarding the mutual problems confronting them.

On April 27 after reporting to work Tidwell was called to the office of Ed Pollard, the laboratory manager, who inquired of Tidwell what had happened at work on April 24. Tidwell explained the difficulties he had encountered, and Pollard had asked Tidwell why he hadn't left a note at the end of his shift noting the problems. Tidwell, consistent with his testimony herein, told Pollard he had left a note but Pollard claimed it was never found. Pollard informed Tidwell that Tidwell had evidently lost his cool, that Pollard did not feel Tidwell had handled the job responsibility properly. Tidwell conceded herein that he had been upset at being unable to resolve the problems on April 24 but felt that he had not "lost his cool" or lost control of the situation. In any event, Pollard said he would give Tidwell the option of returning to his old lower paying job as sample maker without a warning or "write up" or he could remain in quality control but would be given a "write up," and that in the future if he didn't "make it" Tidwell would go out the door or back to sample making. Tidwell opted for retaining the quality control position with a write up. Pollard told Tidwell to come back the next day and Pollard would have a "write up" for Tidwell to sign.

On April 28, according to Tidwell, he talked to Thomas upon reporting to work, and she advised him that the trouble he encountered on April 24 with respect to the [illegible] he had attempted to make had been traced to

had lots of pigment. She also told him that she believed his claim that he had left a note regarding the problem although it had never been found.

On the same day Tidwell reported to Pollard's office for the "write up" but was told by Pollard it was not ready. Later, Thomas took Tidwell to the office saying Pollard and Willoughby wanted to see him. There Willoughby informed Tidwell that he did not feel Tidwell could handle the quality control job. Further, he said that Tidwell should not have been offered the option of going back to the sample making position and added that his policy was "if you don't make it, you go out the door." Willoughby concluded by saying it would be best for everybody if Tidwell were terminated. Tidwell protested the discharge claiming that the problems he had encountered were not his fault and questioned Willoughby's "policy" of not letting employees be transferred from jobs they could not successfully perform. Willoughby persisted in his position and Tidwell was discharged. His separation notice, signed by Willoughby gave as explanation for the discharge: "Poor workmanship & becoming emotional to the point of effecting work."

It is undisputed that Tidwell had received a favorable job appraisal from Thomas on April 1. On a rating scale of A to E with A being the highest, Tidwell was rated A in two of 10 categories, B in four, and C in four. Thomas had also noted on the appraisal that she felt Tidwell was "making progress in learning Q.C. procedures." As a result of the appraisal Tidwell was given a 25-cent per hour raise effective April 1.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), it is incumbent upon the General Counsel to establish a prima facie case that the effected employee was the object of discrimination as a result of his union or protected activity. Thereafter, it

is incumbent upon Respondent to demonstrate that it would have taken the same action against the employee even absent his protected activities. I am persuaded that a prima facie has been established with respect to Tidwell's discharge. Elements of the prima facie case are Tidwell's undisputed union involvement and Respondent's admitted early knowledge of the union campaign through Supervisor Farrell. Other elements of the prima facie case include Respondent's specific knowledge of Tidwell's involvement in union activity by virtue of Tidwell's testimony, which I credit in this regard, that he and certain other employees had a discussion with Farrell about going to the union meeting prior to the meeting, and by virtue of Tidwell's further testimony which is not contradicted and is therefore credited, that Supervisor Darrell Akins had commented to Tidwell the next work day following the meeting that he heard "they" were trying to get a union in. On the other hand, crediting Thomas over Tidwell I do not credit that testimony of Tidwell which suggests that Thomas warned him to watch out about his union activities. The remaining elements of the prima facie case reflecting disparate treatment of Tidwell are found in the questionable validity of the basis for the discharge, Respondent's change of position regarding the discipline imposed on Tidwell, and the timing of the discharge in relation to the beginning of the union activity.

Respondent's position was that Tidwell had encountered some quality control difficulties on his April 21 shift, that he responded to this difficulty by "closing his mold" and that such response justified discipline, that such discipline was decided upon by Lab Manager Pollard without knowledge of a prior determination by Klarich, based on similar conduct of Tidwell, that if Tidwell repeated his offense he would be discharged, that Tidwell's misconduct on April 21 and Pollard's discipline based thereon were brought to Klarich's attention, and that Klarich reversed Pollard's decision and discharged Tidwell's discharge. Respond-

through its witnesses denied that the discharge was related to union activity in any way.

Respondent's evidence regarding the alleged misconduct of Tidwell on April 24 as well as on prior occasions involving a former black supervisor, Lionel Smith, was set forth primarily in the testimony of Farrell. Farrell testified that he witnessed an encounter between third shift Foreman Smith and Tidwell during the first part of the year when Tidwell cursed Smith and called him a black SOB. Farrell testified that he complained to Supervisor Sandy Thomas the following day about this conduct. Thomas confirmed Farrell's complaint in her testimony and added that she discussed the matter with both Smith who verified the account,[12] and Tidwell. Thomas noted on a personal calendar that she gave a verbal warning to Tidwell on this matter on February 11, and she testified that Tidwell was receptive to her critical remarks and warning that such conduct could cost him his job. Thomas also testified that even though she was not Tidwell's direct supervisor at the time she had given Tidwell a verbal warning on November 21, 1986 based upon a similar encounter with Smith. No written warnings were issued and no notation of a verbal warning was placed in Tidwell's file on either of these occasions.

Farrell testified that on the evening of April 24 Tidwell encountered two "retains" [13] one of which involved a color problem which Tidwell found difficult to correct. Farrell related that Tidwell's response was to loudly curse and kick jugs and cans around the laboratory and to complain that the job was more than one man could handle. Farrell conceded that Tidwell's conduct was not

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[12] Smith, having been laid off by Respondent around April 24, was not called as a witness in this matter by any party.

[13] Retains were defined as product samples taken from the production line for testing by quality control for conformity with lab samples. Production lines are stopped while the samples are approved.

directed at Farrell as a supervisor. While there was no evidence that Farrell undertook any disciplinary action himself or made any attempt to chastise Tidwell for his behavior, Farrell testified he did report the matter to both Thomas and Lab Manager Pollard the next work day and complained that Tidwell was "killing his production" and that he wanted Tidwell off the shift.

After receiving Farrell's complaint on April 27 Thomas again talked to Tidwell telling him he could not "blow up" at the supervisors. Tidwell replied, according to Thomas that he understood and was sorry and that he had just lost his "cool." Subsequent, to her talk with Tidwell Thomas testified she reported the incident including her discussion with Tidwell to Lab Manager Pollard who inquired if she thought her remarks to Tidwell had done any good. Thomas reported she believed that they had. She was not aware of the decision to discharge Tidwell until minutes before it took place when she learned from Willoughby on April 28 that Tidwell's conduct could no longer be tolerated.

Pollard did not testify, but Respondent does not dispute Tidwell's testimony regarding his discussion with Pollard and the discipline options offered Tidwell. Testimony was offered, however, regarding the reversal of Pollard's decision on Tidwell's discipline. Thus, Klarich testified he learned of the incident, apparently the second one, between Tidwell and Smith and was incensed particularly by what he viewed as racial slurs directed at Smith by Tidwell. He gave orders to Willoughby and Vice-President McLean that if Tidwell "ever again sounds off or loses control" he was to be "fired on the spot." [11] He subsequently learned on April 28 in a tele-

[11] Klarich related that he talked to Tidwell directly about the matter and told him he didn't want to see it happen again. However, he did not specifically warn him that he would be terminated if it happened again. Further, it is not clear that he told Tidwell exactly what he didn't want to see happen again.

phone call from McLean when Klarich was in California that Tidwell had again been involved in an incident and that Pollard had offered Tidwell alternatives amounting to punishment less than dismissal. Without knowing further details Klarich ordered Pollard reversed and Tidwell discharged. Willoughby and McLean generally corroborated Klarich's testimony in the foregoing respects.

Willoughby explained in his testimony that he had not been aware of Tidwell's conduct on April 24 and Pollard's response to it until he was called to McLean's office on April 28. With respect to the refusal to allow Tidwell to return to his old position as a sample maker Willoughby said it was not his policy to allow employees to revert to lesser positions if they were unable to perform the jobs to which they had been promoted. He acknowledged, however, that at the time of the discharge Tidwell had pointed out that Willoughby had allowed an employee utilized as a lineman to remain as a Banbury operator, a lesser position. However, Willoughby distinguished the situation by pointing out the employee involved had been reduced to the lower position only after the employee had given notice of intent to quit, a notice he subsequently withdrew after a new person was trained in his higher rated job.

While Klarich had testified that he had instructed Willoughby to give a written warning to Tidwell after the February incident with Smith, Willoughby failed to corroborate such an instruction. It is clear that Tidwell did not in fact receive a written warning for the incident.

I am persuaded by the record as a whole and that testimony which I deem either uncontradicted or otherwise credible that Tidwell encountered difficulties with the job on April 24 which he reacted to in the manner related by Farrell. Thus, a basis for his discipline appears to have existed. But his conduct was specifically different in type from that which he had previously been disciplined, insubordinate conduct to a supervisor. Farrell never

claimed that Tidwell was insubordinate to him on April 24. Under these circumstances Pollard's response to Tidwell's conduct after considering Thomas' input appears as an imminently reasonable response. After all, no evidence presented herein establishes that Tidwell was at fault in the inability to remedy the quality problems he encounted on April 24. It is in Respondent's reversal action that I believe Respondent has demonstrated that ulterior motivation which persuades me that Respondent's discharge of Tidwell was pretextual and responsive to his union activity. Obviously, Pollard had never been advised of Respondent's claim of a prior determination to discharge Tidwell for sounding off or losing control. The fact claimed in Willoughby's testimony that Pollard was a relatively new lab manager only having been "aboard" 3 or 4 weeks [15] at the time is no excuse for failing to advise him of past job deficiencies of those relatively few people under his supervision. Clearly there was nothing in Tidwell's personnel file which would call Pollard's attention to any prior alleged misconduct of Tidwell, and while Pollard did confer with Thomas regarding her assessment of the Tidwell situation and background, she clearly related nothing, and obviously was aware of notihng, which would preclude Tidwell's continued employment.

Respondent's reversal of Pollard's decisions regarding Tidwell is strong evidence of its unlawful motivation. But further evidence of such motivation is found not only in the timing of Tidwell's discharge at the very outset of the union activity and Respondent's awareness of it, but also in Respondent's failure to conduct any investigation of Tidwell's conduct independent from that of

[15] Willoughby's estimate of how long Pollard had been employed as of April 28 was never substantiated. On the other hand, it is clear that Pollard signed a payroll change form for Tidwell, as did Willoughby, on April 1 giving Tidwell a raise. It would thus appear that Tidwell had been employed by Respondent a sufficient period of time prior to April 1 to contribute to the evaluation of Tidwell.

Pollard. Klarich admittedly did not seek to ascertain any facts of Tidwell's conduct on April 24 before directing the reversal of Pollard. There was no concern shown by Klarich for whether Tidwell had repeated the offense of issuing racial slurs which Klarich had found so reprehensible in the earlier incident. Even the fact that Klarich issued the discharge decision by telephone reflects the highly unusual treatment of the Tidwell situation. Klarich could not recall a specific incident of having made a previous decision to discharge a rank and file employee by telephone.

The fact that Respondent discharged Tidwell within one month of his last wage increase also belies its present contention regarding the gravity of Tidwell's April 24 conduct. It is to be particularly noted that Willoughby signed the payroll change form granting Tidwell's raise even though that form showed that Tidwell's conduct was "good". Willoughby noted no exceptions to this marking of the form notwithstanding his claimed knowledge of Tidwell's prior misconduct in February, a time only 6 weeks earlier, and Klarich's alleged instructions to discharge Tidwell for any subsequent misconduct. The grant of an increase and the approval of the form so marked is clearly inconsistent with the position taken by Respondent at the time of Tidwell's discharge.

Finally Respondent's refusal to consider a demotion for Tidwell as an alternative to discharge reflects a steadfast determination to be rid of Tidwell, a determination which points again to discriminatory motivation. Willoughby's failure to advise Pollard of the policy against demotions again belies its existence as anything other than one applied on a selective basis.

Considering the foregoing I do not believe that testimony or evidence of Respondent's witnesses to the effect that Tidwell's discharge was for cause unrelated to union considerations. Rather, I conclude Respondent has failed to rebut the General Counsel's prima facie case that the

discharge of Tidwell was responsive to his union activities. Accordingly, I find as the complaint alleges, that the discharge of Tidwell was in violation of Section 8(a)(3) & (1) of the Act.

b. *John Armstrong*

Armstrong was initially employed in October 1985 but was laid off after two weeks. He was recalled in April 1986 and worked until his discharge on April 29 for "poor work performance." Armstrong, a utility worker at the time of his discharge, testified that he was approached by Rodgers on April 24 about attending a union meeting and joining the Union. Armstrong expressed interest but did not attend the meeting. However, he testified he was given a union authorization card by employee Ed Hurst about April 25 and executed the card on that date and returned it to Hurst.[16]

Joe Ingram's approach to Armstrong regarding the Union on April 27 has already been related. Armstrong related that also on April 27 he overheard Foreman Darrell Akins tell leadman Lance Coon that if Armstrong asked for any kind of a day off or anything, Akins wanted him fired, and Akins then asked Coon to ask Armstrong if he had anything to do with the Union. On cross-examination Armstrong expanded on the Akins-Coon exchange saying Akins told Coon that if Armstrong was late one minute, "I want you to fire him," and "If you find out he's got anything to do with the Union, I want you [to] get rid of him and I want you to tell me." Armstrong neglected to include either version of Akins'

[16] Armstrong's card bears the date of April 25 but was entered with a different pen than that used to enter the other information, and Armstrong said he did not date it. Ed Hurst denied that he had spoken to Armstrong about a union card. Armstrong was less than a model witness and his recall was confused and uncertain. Hurst was clearly more positive and I credit his denial that he secured Armstrong's card. It is clear, however, based on the testimony of Union representative Hendrix whom I credit that Armstrong's card was given to Hendrix on April 28 by Rodgers.

alleged remarks in either of two written prehearing investigation statements given the Board, although he had referred to questions by Coon about union activity.

On April 28, according to Armstrong, he was assigned to run the 1B-Banbury machine around 11:00 a.m. replacing employee Jerry Millsaps. He noticed after running the machine 15 to 20 minutes that a large amount of the plastic material being processed was leaking out of the machine's seals. Such leaking was a normal condition but if excessive it could interfere with production and even damage the machine. Armstrong conceded that it was the function of the operator of the machine to periodically clean off the excess plastic, either using relief machine operators or, when necessary, shutting down the machine before the build up of plastic at the seals got excessive. Armstrong testified that the buildup of plastic leaking from the seals was greater than he had even seen, and he told Neal Shaw, the line operator on the floor below whose operation in part was fed by Armstrong's machine, that he needed to shut the machine down. Shaw told Armstrong to keep operating and twice refused Armstrong's request to summon Foreman Akins. Ultimately Shaw did call Akins who, upon seeing the problem, shut the machine down and berated Armstrong for letting the condition occur. Armstrong admitted that the machine was down for 2½ to 3 hours during which time Armstrong and maintenance man Fred Lawson removed the plastic buildup by chipping away at it with various tools including crow bars and hammers.

On the following day, Akins advised him that Willoughby and production manager Denver Millsaps wanted his job. Akins then terminated him saying that Armstrong had too many reprimands. Thereafter, Armstrong talked to Willoughby and asked why he had been laid off. Willoughby responded that Armstrong was not laid off but was fired. Nevertheless, according to Armstrong's testimony, Willoughby said he would look into the matter.

The elements of the prima facie case of a violation of Section 8(a)(3) and (1) in Armstrong's discharge as argued by the General Counsel are Armstrong's involvement in Union activity, Respondent's knowledge of that activity inferred on a small plant-small community basis, Respondent's union animus as demonstrated by its conduct violative of Act in other respects, the alleged threat of Akins overhead by Armstrong, the timing of the discharge coming so close to the union activity, and the absence of valid cause for the discharge.

Respondent's evidence regarding the discharge of Armstrong was set out primarily in the testimony of first shift production foreman Akins. Akins described Armstrong's general job performance as poor and claimed he frequently talked to him about it.[17] In the preceding 12 months Armstrong had been given two "write ups" related to job performance and three related to excessive tardiness and absenteeism,[18] The latest of which was dated April 27, although Akins testified he had already spoken to Armstrong about it the preceding Friday. Akins testified that on April 28 one of his regular 1B-Banbury machine operators, Jerry Millsaps was absent and another one, Martin, was late. Thus, he had to put Armstrong on the machine at the beginning of the shift, and Akins testified he observed that the seals on the machine were clean at the time. Akins also testified that around 10:00 a.m. that morning he noted that the seals on Armstrong's machine had become excessively jammed with layered plastic, and obviously had not been cleaned

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[17] Armstrong admitted in his testimony that Akins "tried to stay after me all the time."

[18] Armstrong on direct examination acknowledged only one prior warning of any type. On cross-examination he was confronted with the additional warnings purportedly signed by him. He denied three prior warnings and claimed the signature was not his. A comparison of Armstrong's purported signature on the warnings with a document executed by him at the time of his discharge lead me to the conclusion that the purported signatures are authentic.

since it was started up that morning. Akins, contrary to Armstrong's testimony, said he had not been called by anyone to Armstrong's machine. After noting the problem he called for the machine to be shut down and called the maintenance man to undertake the cleanup, a process that took more than two hours before the machine could be put back in use.

Later the same day, according to Akins, he complained to Willoughby about Armstrong's actions and asked Willoughby what to do. Willoughby told Akins to review Armstrong's personnel file and do whatever he wanted. Akins did so, noted Armstrong's prior reprimands, and decided to discharge him. He began filling out a discharge notice on a standard warning notice but did not complete it. The discharge paper was reviewed and rewritten by production manager Millsaps on the following day and the discharge was then effectuated.

Millsaps testified that he made the decision to discharge Armstrong but it was based on Akins' recommendation. He explained that he rewrote Akins document because it was dirty, and had some words misspelled.[19]

I have previously found herein that Armstrong was incredible with respect to certain 8(a)(1) allegations. His testimony regarding the details of his discharge I likewise find incredible. His failure to tell the Board investigator of Akins' alleged instructions to Coon regarding discharging Armstrong constitutes a critical omission that warrants the conclusion that such alleged instructions to the extent they involved union activity were a pure fabrication by Armstrong. I credit Akins and Millsaps where their testimony contradicts Armstrong's. I conclude that Armstrong did not keep the Banbury seals sufficiently clean and that clear cause for disciplinary

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[19] That it was not unusual for Millsaps to make changes in documents is demonstrated by the uncontradicted fact that he had changed one of Armstrong's prior warnings in November, 1986.

action existed. Moreover, assuming arguendo, that Respondent was aware of Armstrong's union inclinations, Respondent's decision to terminate Armstrong appeared entirely reasonable in light of his reprimand record and his own admissoin that Akins was always after him which clearly reveals that Armstrong was a marginal employee. Having credited the validity of Respondent's basis for Armstrong's discharge I conclude Respondent has demonstrated that Armstrong would have been discharged even in the absence of his union activity. I therefore find no violation of Section 8(a)(3) and (1) of the Act in his discharge.

c. *Leroy Hamby*

Hamby was employed initially by Respondent on a temporary basis as a maintenance helper in early January. Around March 27 Hamby's supervisor, maintenance manager Larry Murphy, gave Hamby an option of becoming janitor or taking a layoff. Hamby chose to take the janitor position. In this capacity he was responsible for cleaning the lunch room, restrooms, plant and warehouse floors, and some supervisors' offices. According to Hamby's testimony, he was told the first few days on the janitor position that he was doing a good job by various supervisors including Murphy, Millsaps and Ingram. Hamby further testified that he was never told that he was not doing a good job, and was completely unaware of any dissatisfaction with his work performance prior to his discharge on 1 May.

Hamby signed a union authorization card for Rodgers in the plant on April 27. He had been aware of the advent of Union activity from a conversation with Rodgers on April 24 when Rodgers had initially inquired of Hamby whether he would sign a union card.

The conversations Hamby had with Millsaps and Ingram regarding the Union have already been set out above. On May 1, Murphy called Hamby to his office

where he told Hamby that he was going to have to let him go because he wasn't doing his job. Hamby testified he asked no questions of Murphy regarding the discharge, but added that he did attempt to inquire of Willoughby the reasons for his "permanent layoff," but Willoughby was too busy to give him a response. Respondent prepared a separation notice for Hamby stating as reason for the discharge: "Lacking in job efficiency." That reason is also found on a reprimand form executed by Murphy on 1 May.

Respondent's evidence regarding the basis for Hamby's discharge was expressed through Murphy. Murphy, who testified that he supervised the maintenance mechanics, helpers, and the janitor, testified Hamby was hired as a temporary employee to assist th emaintenance mechanics in connection with some expansion work, and that while Hamby had indicated prior experience in such work Murphy found that his job performance was lacking. He testified that he had talked with Hamby several times and told him he was not performing adequately. Nevertheless, because Hamby had earlier expressed interest in a permanent job, Murphy offered Hamby a position as a janitor when the job became available, and Hamby accepted the position even though it involved a reduction in his hourly rate of pay.

According to Murphy, Hamby performed well as janitor for 2 to 3 weeks but then Murphy observed that he began to hurriedly and inadequately do his duties and thereafter begin annoying people on the plant floor by standing and talking to them. Murphy testified he advised Hamby several times that he could not tolerate that and that if Hamby ran out of things to do he should report to Murphy. Thereafter, Hamby would briefly improve. Murphy related that Willoughby also noted Hamby's standing and talking in the plant and complained to Murphy. Murphy testified that he initially decided to discharge Hamby during the week prior to

May 1 and monitored him closely thereafter, finally deciding to discharge him on May 1. Murphy conceded he had given Hamby no prior formal or written warnings but claimed it was not his practice to do so. He claimed that he had previously discharged an employee on November 26, 1986 for poor quality work, and had only given the employee "verbal counseling" prior to the discharge. Finally, Murphy denied that union activity was a factor in the discharge of Hamby.

If one accepts the testimony of Hamby he was not warned regarding the inadequacy of his work and the failure to warn would undermine the validity of Respondent's contention regarding the basis for his discharge. I have previously found Hamby to be a credible witness herein, and I credit him in this instance also. Murphy impressed me as a less reliable witness with a tendency to exaggerate. While Murphy testified that Hamby's performance as a janitor the first 2 or 3 weeks were good, he nevertheless at one point testified that Hamby from the beginning day as a janitor stopped daily and talked to leadman Lance Coon 10 to 15 minutes at a time. This inconsistency demonstrates a desire to overemphasize any inadequacy of Hamby. Moreover, to the extent that Hamby talked to other supervisors and employees during the work day there was no evidence that he interfered with their work. Indeed, foreman Akins, one of those to whom Hamby allegedly habitually talked, denied there was any interference with his work or that of his employees by virtue of such talking. There was no evidence that there was any supervisor involved in any talks with Hamby complained to Murphy about them. Finally, there was no evidence submitted, other than Murphy's subjective conclusions which would support the fact of Hamby's work inadequacy. No details were provided regarding Hamby's failure to clean any specific area or perform any specific assigned task notwithstanding Murphy's claim that he closely monitored Hamby during the last week of his employment. Accordingly, and in the absence of prior

warning, Hamby's discharge during the first week of the overt union campaign and 4 days after he signed a union authorization card is highly suspect.

The weakness of the General Counsel's case in Hamby's discharge is found in the absence of direct evidence that Respondent was aware of Hamby's specific union involvement. The Charging Party argues that such knowledge may be inferred on the basis of a small plant doctrine as applied by the Board in *Permanent Label Corp.*, 248 NLRB 118 (1980) and *Coral Gables Convalescent Home, Inc.*, 234 NLRB 1198 (1978). The Board has long held that knowledge of an employee's union activity may be inferred from the record as a whole. See *Darbar Indian Restaurant*, 288 NLRB No. 62 (April 20, 1988); *Grey's Colonial Acres Boarding Home*, 287 NLRB No. 89 (Dec. 16, 1987). See also *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959). I believe such an inference is warranted here. Respondent employed less than 40 unit employees, and the plant was located in a small community. It was aware early on of union talk among its employees and specifically aware of the first union meeting after the second shift on April 24. Murphy himself was admittedly aware of the union activity on April 27. Hamby signed his union card at the plant on April 27 after talking to Bucky Rodgers in both the plant's parking lot and the locker room. Rodgers was an individual conceded by some of Respondent's supervisors including Thomas, to be the most likely union supporter at the time. Murphy conceded that he closely monitored Hamby beginning the last week of Hamby's employment. Hamby's discharge followed within 4 days the signing of his union card, it followed certain 8(a)(1) conduct of Respondent already found, and the discharge was based upon unsubstantiated reasons.

Considering all the foregoing, I conclude it may be fairly inferred that Respondent was aware of Hamby's union involvement. I further conclude that the timing of

his discharge coupled with Respondent's union animus demonstrated by violations of Sections 8(a)(1) found herein and the absence of prior warning regarding his alleged work deficiencies clearly establish a *prima facie* case that the discharge of Hamby was a response to his union activity and constituted a violation of Section 8(a)(3) & (1) of the Act. Since I do not credit Respondent's evidence that Hamby had previously been warned of his job performance and since I have concluded that Hamby's work inadequacies were not credibly established by Respondent on this record I find that Respondent has failed to rebut the General Counsel's prima facie case. I conclude that Hamby's discharge violated Section 8(a)(3) & (1) of the Act as alleged.

d. *James R. White*

White signed a union authorization card at the union meeting at the Vonore filling station on April 24.[20] He served as a union observer during the 25 June election. Having been hired by Respondent in May 1985 White last worked as a liquid color mixer mixing what he referred to as "hazardous chemicals" and pigments. White testified that on several occasions he had made complaints to Ingram and Willoughby about the lack of ventilation in his work area, the lack of appropriate respirators, and the presence of smoke and minute particles (pearl) floating in the air resulting from the production process. White testified that the conditions prevailing were physically affecting him and Don Cordell, the employee with whom he worked. The last complaint White voiced to Ingram occurred shortly after the election when, according to White, he protested the absence of ventilation in his area. Ingram stated Respondent was not going to put fans in White's area.

The next day following White's last complaint to Ingram, White was called to the plant conference room

[20] While he dated the card April 23 White conceded this date was in error.

where he was confronted by Ingram, Vice-President McLean, and supervisors Murphy and Millsaps. McLean related that the conference was regarding the incident between White and Ingram the preceding night. White took that as an opening to voice more complaints about the fumes in his work area, complained that he was getting sick from it, and added that if they had to carry him out on a stretcher he would be back with a lawyer. He further volunteered that the reason he thought they needed a union there was "on account of health and safety violations." [21] Nevertheless, still according to White, McLean, apparently referring to the exchange the night before between Ingram and White, said he wasn't going to have White talking to his supervisors that way. White denied herein that he had used any profanity or vulgarities in talking to Ingram other than to tell him to "clean this damn place up." He admitted, however, that profanity was not uncommon in the plant.[22]

On 18 August, according to White, he observed Willoughby talking to Murphy at the plant time clock and decided to complain to Willoughby that Ingram was no longer speaking to White. White approached Willoughby, voiced his complaint and, according to White, Willoughby "blew up," told White if he didn't like it he could quit, and began yelling at White. White told Willoughby he could not talk to White that way and if he would just give White a layoff White would "go to the house." White further related he told Willoughby that he would go back to work, but added, "I'm not your trash." Willoughby told him if he wanted to be fired, he was fired and pro-

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[21] White testified, without contradiction, health and safety was a big issue in the union organization campaign.

[22] While White testified that nothing came of this meeting, Respondent produced a written warning dated 6 August signed by McLean accusing White of verbally abusing Ingram on 5 August, advising White that this was intolerable, and warning him that it was a serious violation of work standards.

ceeded to clock White out. Willoughby then told him to get out before he was thrown out.

It is the General Counsel's theory that White had engaged in no misconduct warranting his discharge, and that in actuality the discharge was provoked by White's union involvement Respondent's knowledge of which was clearly demonstrated by White's serving as a union observer during the June 25 election. I concur that if White's version is given full credence there would appear to be no valid basis for discharge, and a prima facie case of a violation of the Act would be established. I am unable to accept White's unsubstantiated version, however, and find Respondent's evidence regarding the basis for his discharge more credible and persuasive.

Thus, Ingram testified regarding the 5 August encounter and asserted that while he was in the production area White approached him, got in front of his face, and loudly cursed him, complaining about his working conditions. Specifically, White said that when he hit the floor jerking he would not "be no suck ass like Darrell Akins," [23] that he would sue Ingram's ass as well as that of other supervisors, that his grandmother had the money to enable him to sue, and that his nerves were gone and he could not sleep because of the chemicals he worked with. Ingram testified he made no response to White and turned and walked away in spite of the profanity that White used.

Ingram further testified that he went to Willoughby about the matter and Willoughby told him to document the encounter, and the next morning to have White's final checks prepared. This was done, but the next day when the checks were taken to McLean for signature McLean, in light of White's threat to sue, decided to check with counsel before effectuating the discharge. After checking with counsel it was concluded that since White had been

[23] The record suggests Akins was once overcome in the plant by fumes and passed out.

the Union's observer, White should not be discharged, only warned. Accordingly, a meeting was held with White on 6 August attended by Ingram, McLean, Murphy, and Millsaps. Ingram's note prepared after the meeting reflects that White was told that he had to be willing and able to do the job, and if he could not be would be of no use to Respondent. He was further told that he could remain as a team man without vocal outbursts but that if he could not he would be replaced. Moreover, he was told that this would be his last warning and if the same thing happened again he would be discharged.

Ingram's testimony regarding the 5 August encounter with White was corrobortaed by Murphy and employee Don Cordell. His testimony regarding the disciplinary action was corroborated by Willoughby, McLean, and Murphy. Cordell, contrary to White's testimony, specifically confirmed White's use of profanity toward Ingram. Cordell's testimony was very convincing. While Cordell can not be regarded as unbiased on the union organization issue,[24] he impressed me as fully truthful and, having worked with White, appeared sympathetic to him. However, he testified he observed White to be excitable during the encounter with Ingram and he did not believe that White realized what he was saying. Crediting Cordell, Murphy, and Ingram in this instance, and without regard to the validity of White's complaints about his working conditions, I find White's forceful loud and abusive language toward Ingram provided just cause for discipline. Although profanity or abusive language may have been commonplace in the work area there was no evidence that such language directed at supervisors in a forceful manner had been tolerated. I conclude White would have been disciplined even absent his union activities. Indeed, based on the credited evidence it was White's Union involvement

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[24] Cordell had reported to Ingram on the morning of April 27 that he had heard that there had been a union meeting the preceding Friday night but identified no individuals attending.

which prevented his discharge in this instance. I find no violation of the Act in the warning issued White on August 6.

Regarding the August 18 incident resulting in White's discharge Willoughby testified that on that date he was in the plant talking to Murphy when White approached saying he wanted to talk to Willoughby. Willoughby told him to wait a minute and turned to complete his remarks with Murphy. White stated at that point that he was getting "god damned tired of you people" adding that if they did not want to have anything to do with him to give him a layoff. Willoughby testified he told White who was loud and agitated and standing within 3 feet of him to calm down and tell him the problem. Although White complained he was being ignored Willoughby told him to calm down and return to his job and added that he was not going to give White a layoff although White could quit if he wanted to. White then turned away, but in doing so stated that he was not going to quit, and that he was going to stay and "fuck you son-of-a-bitches." At that Willoughby told White the choice was no longer White's and that he was terminated.

Willoughby's testimony in the foregoing respects was generally supported by Murphy. Cordell, while he did not hear the words exchanged between Willoughby and White, testified he observed White shaking his finger at Willoughby and heard him "hollering." Indeed, Cordell testified he had noted that White appeared to be "aggravated," and when White told Cordell prior to the incident that he was going to talk to Willoughby Cordell cautioned him not to "go over there and blow up."

In this instance I credit Willoughby's testimony as directly corroborated by Murphy and largely supported by Cordell. Having been expressly and legitimately warned about similar conduct almost 2 weeks earlier it is clear that White's intemperate language and insubordinate conduct toward superiors provided a clear basis for discharge

without regard to the merit of White's job complaints. Further, in light of the earlier lawful and express warning to White that a repeat of such conduct would be followed by his discharge it is clear that Respondent has demonstrated that White would have been discharged even in the absence of his Union and protected activities. Accordingly, I find no violation of Section 8(a)(3) and (1) of the Act in White's discharge.

2. The Alleged Constructive Discharge of Darrell Martin

Darrell Martin was employed by Respondent from October 1986 until May 15 when he admittedly quit his employment. At the time of such quitting, which the General Counsel and Charging Party argue was forced upon him due to his union support, Martin was employed as a Banbury machine operator and has been employed in that position for several months. Martin signed a union authorization card on April 24 at the union meeting on that date. He also successfully solicited two other employees to sign authorization cards on April 25 and 27. Coercive remarks regarding the Union attributed by Martin to Willoughby have already been set forth above. By virtue of Martin's response to the questions of Willoughby concerning whether Martin was for the Union it is clear that Respondent was aware of Martin's union sympathies. As the 1B-Banbury machine operator it was Martin's function to weigh plastic "shots" and plastic color ingredients and insert the material into the machine which "cooked" or melted the ingredients and dropped the material into an extruder process on the floor below. At times the work was fast paced and hectic depending upon the weight of the loads put into the machine and the time necessary to "cook" the loads. Some runs required weighing material and loading the machine once every 45 to 60 seconds, and some loads weighed approximately 50 pounds. In addition, there was considerable dust and heat attendant to

operation of the machine.[25] These factors including the necessity for accurate weighing of materials by the machine operators made the job a difficult one requiring substantial effort and attention. It was made all the more difficult with the change in shift operations on April 27 because only one operator per shift was used on the machine after that date.

Martin testified that on May 15 he became ill around noon with chest pains and nausea, but continued to operate his machine. At his 2:00 p.m. break he talked to Supervisor Millsaps in the breakroom and advised him of his illness. Millsaps told him Respondent was planning a better ventilation system and said things would get better. Martin complained that he could not handle the job, but proceeded back to his job and completed his shift. At the completion of the shift he told Millsaps and Darrell Akins in separate conversations he couldn't handle the job and would not be coming back. Still according to Martin, Akins told him he should stay, that things would be getting better and he should not leave. Millsaps likewise, in Martin's words, "tried to get me to stay," but Martin did not return to work the next work day.

It is well established that a constructive discharge violative of the Act occurs when an employer deliberately makes working conditions for a union advocate unbearable. To establish a constructive discharge it must be proven first that the "burdens imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign." And secondly, "it must be shown that those burdens were imposed because of the employee's union activities." *Crystal Princeton Refining Co.*, 222

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[25] Martin testified that he had to mix some dry chemical colors with the shots and frequently inhaled the dust from such chemicals. As a result he occasionally coughed up colored phlegm and would experience chest pains and nausea. While he testified he had gotten sick on the job twice before 15 May he never told anyone about it.

NLRB 1068, 1069 (1976). See also *Seville Flexpack Corp.*, 288 NLRB No. 61 (April 20, 1988).

I find the General Counsel has failed to establish either element of a constructive discharge in Martin's case. While Martin may have found the working conditions unbearable there is no evidence that the changes in operation which increased the difficulty of the job were intended to cause him to quit. The changes were equally applicable to all the 1B-Banbury operators and no others quit. Secondly, based on the facts already found in this case Respondent planned the changes effecting the 1B-Banbury operation before the union campaign began and implemented the changes prior to the time that any knowledge by Respondent of Respondent of Martin's union activities was shown. Accordingly, I find no constructive discharge of Martin and thus, no violation of Section 8(a)(3) and (1) of the Act in this regard.

III. The Objections To The Election

The Union filed 22 numbered objections to the election, but subsequently withdrew objections numbered 1, 2, 4, 5, 6, 7, 8, 15, 16, 18, 19, and 20. The remaining numbered objections will be individually addressed below.

Objection 3:

This objection refers to the discharge of Leroy Hamby. Hamby's discharge was found above to constitute an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act. Hamby's discharge occurred within the critical period between the filing of the petition and the holding of the election. Generally, conduct which violates Section 8(a)(1) of the Act is, a fortiori, conduct which interferes with the election. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-1787 (1962). I find this objection has merit.

Objection 9:

This objection complains that Respondent's manager told employees in a meeting that prounion employees would make less money than antiunion employees. The complaint herein, as amended, made no such allegation or one similar to it. No independent evidence was offered by the Union to substantiate the allegation. Accordingly, I find this objection to be without merit.

Objection 10:

Objection 10 asserts that Respondent created an atmosphere where union supporters felt they were under surveillance by plant manager, supervisors, and "nonbargaining [unit] employees." It appears to be related to the allegations of paragraph 18 of the complaint which alleged surveillance of union activities by Respondent. This complaint paragraph was dismissed at the hearing upon motion by Respondent in the absence of evidence to support the allegation. No separate allegation was made in the complaint attributing to Respondent the creation of an impression among employees of the surveillance of their union activities. Furthermore, no independent evidence was adduced by the Union or cited in its brief to support this objection. Accordingly, the objection is found to be without merit.

Objection 11:

In Objection 11 the Union contends Respondent's supervisors increased the work load of union supporters. This objection appears to have its foundation in the constructive discharge allegations relating to Darrell Martin. It is clear as found above, that Martin was not discharged, and instead quit. Moreover, while the record shows that Respondent did change to a 10 hour shift on April 27 and did cease relief rotations on the 1B-Bandbury machine on that date making the job more difficult. I have previously found that the change was decided upon and announced prior to the advent of the union activity.

It cannot be said that these changes therefore were responsive to the union activity. In addition there was no evidence that any increased burdens on employees as a result of these changes were disparately or disproportionally imposed upon union supporters. Finally, the elimination of the relief operators for the Banbury machines took place prior to the filing of the petition and thus outside the critical objections period. *Parkview Acres Convalescent Center*, 255 NLRB 1164, 1189 (1981). I therefore find no merit to this objection.

Objection 12:

In this objection the Union claimed that the plant manager told employees in a meeting that wages would be cut back to minimum wage if the Union was voted in. The objection appears to be coextensive with the allegations of the complaint regarding a threatened loss of benefits and is predicated upon the same testimony cited above attributing to Willoughby the threat at the employee meeting on May 14 that if the Union came in employees would be cut to minimum wage. Having found above that Willoughby made no such remark it is concluded that there is no merit to this objection.

Objection 13:

In this objection the Union contends that Willoughby and other supervisors told employees that Respondent knew who signed union authorization cards. No evidence was adduced on the point, and I find the objection to be without merit.

Objection 14:

According to this objection Willoughby told employees that union supporters would be terminated. While no evidence of a specific threat of discharge by Willoughby was alleged in the complaint the complaint did allege that Supervisor Ingram had made such a threat. While

I have found above that Ingram indeed made threatening remarks to Hamby it apepars they occurred prior to April 30 when the petition was filed, and accordingly took place outside the critical objections period. I therefore find no merit to this objection.

Objection 17:

In this objection the Union contends that employees were called to supervisors' offices to discuss the Union. There was no independent evidence to support this contention cited in the Union's brief and a canvass of the record reflects no supporting evidence. I find the objection to be without merit.

Objection 21:

The allegations of Objection 21 are coextensive with the allegations of paragraphs 23 and 24 of the complaint which complain that Respondent granted its bargaining unit employees a wage increase on May 14 to cause the employees to reject union representation. No merit was found above to this complaint allegation. Accordingly, no merit is found in Objection 21.

Objection 22:

The last union objection asserts that Respondent on May 15 installed ventilating fans in order to discourage employees to vote for the Union. No evidence in support of his objection was adduced. On the other hand the record reflects some testimony by employees regarding the absence of adequate ventilating fans. Accordingly, no merit is found in this objection.

Notwithstanding the failure to find merit to most of the Union's specific objections, I have found that Respondent engaged in other conduct violative of Section 8(a)(1) within the critical period. Such conduct even in the absence of a specific objection thereon is sufficient

to warrant the setting aside of the election. *Dal-Tex Optical*, supra.

IV. *The Appropriateness of A Bargaining Order*

A. *The Appropriate Bargaining Unit and Disputed Inclusions*

In a Stipulation for Certification Upon Consent Election executed by Respondent and the Union the appropriate collective bargaining unit was described as follows:

> All production and maintenance employees employed by the Employer at its Vonore, Tennessee facility, including leadmen, laboratory employees, dry color employees, shipping and receiving employees, liquid employees and quality control employees, but excluding all office clerical employees, guards and supervisors as defined in the Act.

At the hearing herein the parties stipulated again, and I conclude, that the above described unit is one appropriate for collective bargaining. However, the parties disagreed with respect to the inclusion in the unit of two employees, Diane Byrum and Lisa McWaters, with Respondent arguing they are plant clerical employees and with the Union arguing that they are office clericals not includible in the unit.

The evidence reflects that McWaters, having been initially hired as a receptionist, was employed at all material times as an order entry clerk. In this position she received telephonic product orders from customers and prepared the paperwork for such orders utilizing normal office equipment and a digital computer. She also generated shipping paperwork for orders and supplied order information to the production manager and shipping information to the shipping department. McWaters' primary work location was in the main office where office clerical employees are located. She worked in an area

adjacent to the office of Willoughby who directly supervised her. While McWaters was paid by the hour, she did not punch a time clock. She enjoyed the same fringe benefit package granted all Respondent's employees and had access to a production employees break room although she also had access to an office clerical coffee facility. She worked a normal 8 hour-day, 40 hour week as do the office clericals, and was not affected by the change to a 10 hour shift on April 27 which effected most of the unit employees. Her contact with unit employees was limited to incidental contact while taking paperwork into the production area about 4 or 5 times a day.

Bryum occupied at all relevant times the position of lab secretary located in a lab manager's office adjacent to the lab as well as to the main office area. Byrum worked under the supervision of the lab manager producing paperwork for the lab as well as plant production reports. She prepared paperwork associated with shipping of lab samples and liquid department requisitions. She spent an estimated 25 percent of her work time out of her primary work location and allegedly in direct contact with lab or production employees. In performing her primary functions she utilized a computer terminal and regular office equipment. On at least one occasion she was used by lab manager Pollard to type a memo to McLean describing the unsatisfactory conduct of Tidwell on April 24. Like McWaters, Byrum was hourly paid, received the fringe benefits universal to unit and non-unit employees, and worked the same hours as office clericals.

The plant clerical-office clerical distinction is rooted in community of interests concepts. *Minneapolis-Moline Co.*, 85 NLRB 597, 598 (1949). Here, contrary to Respondent's position, I conclude that McWaters and Byrum's work interests were more closely associated with that of office clericals than unit employees by virtue not only of their work location but also their job duties and working

conditions. Neither performed production work of any type even on a sporadic or part time basis. They worked different hours from most of the production employees. That Respondent itself viewed then as being more closely associated with clerical employees in interests was demonstrated by its failure to grant them the 40 cent per hour increase granted the unit employees in May. The lab manager's use of Byrum to type a personnel memo reflects the same point. While the paperwork generated by Byrum and McWaters related to production work their direct contact with unit employees does not appear to be extensive or significantly greater than their contact with office clericals. Accordingly, I conclude that Byrum and McWaters do not have a sufficient community of interests with production unit employees to warrant their inclusion in the unit.

B. *The Union's Majority Status*

Excluding Byrum and McWaters and including Tidwell who was found herein to have been unlawfully discharged it appears that on April 30 there were 33 employees in the appropriate unit. Twenty-one union authorization cards executed by unit employees were identified and received in evidence. Excluding the card signed by Armstrong who was lawfully discharged, and the card of Coley who I find below effectively withdrew his card on April 28, 17 of these cards were signed on or before April 27.[26] The cards with the caption "Authorization

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[26] These cards are those purportedly signed by Robby Belcher, James Browder, Marshall Coley, Ricky Calvin, Richard Flake, Leroy Hamby, Carl Jones, Ed Hurst, Stephen Lenoir, Timothy Lenoir, Darrell Martin, Jimmy Millsaps, James Rodgers, Calvin Suttles, Jeff Tidwell, Rickey White, Glen Goforth and Vic Murphy. Two additional cards those of Steve Smith and Troy Medlin were signed on May 5. Respondent's brief suggests there was an additional unit employee not appearing on the stipulated list of employees shown on the payroll of May 5. This suggestion is based upon Willoughby's

and Application for Membership" not only constituted an application for membership, but also designated the Union as the exclusive bargaining representative of the signer. Further, the cards specifically authorized the Union "to request recognition from my employer as my bargaining agent and/or to petition the National Labor Relations Board for an election for certification of said Union as my bargaining representative." I find the cards are clear and unambiguous. Where appropriately executed in the absence of improper inducements I find the cards are valid designations of the Union as collective bargaining representative.

Respondent attacks the validity of the card signed by Browder which bears the date "27 June 87," a date obviously in error, since the card also bears the date stamp "87 Apr 30" of the Board's Region 10 office. Respondent contends that since Browder was not called to testify regarding the date the authenticity of the card is doubtful. Browder's card was identified by Martin who solicited the card from Browder and who testified that it was signed on April 27. I credit Martin who is supported by the Region's date stamp on the back. It is well established that a union card may be effectively identified by witnesses other than the card signer. *McEwen Mfg. Co.*, 172 NLRB 990 (1968). I find Browder's card was a valid designation of the Union as of April 27.

Respondent argues that the card of Marshall "Mac" Coley was invalid for majority purposes because he effec-

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testimony of an employee named Dwight Bevins being shifted into the unit on April 27. Willoughby's testimony appeared uncertain on this point, however, and Bivens inclusion in the unit is inconsistent with the stipulated list of unit employees, which list, with certain exceptions, became the *Excelsior* list for the election. Under these circumstances, as well as Respondent's failure to explain why Biven's name did not appear of the stipulated list of unit employees I find the record insufficient to establish that Bivens may properly be included in the unit.

tively withdrew the authorization on April 28, by seeking on April 28 the return of his card, executed on April 24, from Rodgers who had solicited the card. Rodgers testified for Respondent that Coley had in fact asked for his card back and Rodgers had communicated the request to union representative James Hendrix who told him that the card had likely already been forwarded to the Board with the petition. Hendrix gave Rodgers the address of the Board's regional office. Rodgers admittedly did nothing further. Hendrix testified only that Rodgers reported to him that Coley was "shakey," and did not request return of the card. Whether or not Rodgers communicated the Coley request for revocation of his card to Hendrix Respondent, citing *Production Plating Co.*, 233 NLRB 116, n. 4 (1977), enf'd 614 F.2d 1117 (6th cir. 1980) and *TMT Trailer Ferry, Inc.*, 152 NLRB 1495, 1496 (1965), contends Coley took sufficient reasonable action to revoke the card.[27] The General Counsel counters citing *Photo Drive Up*, 267 NLRB 329, 362 (1983) as standing for the principle that revocation to be effective must be communicated by the card signer to the Union, and the General Counsel implies that only direct contact with the Union by the card signer can validate a revocation. Contrary to the General Counsel and regardless of whether Rodgers communicated Coley's request to Hendrix, I find based on Rodgers testimony, uncontradicted in this regard and therefore credited, that Coley had taken sufficient reasonable steps to revoke his card. *Production Plating Co.*, supra. I find Coley's revocation effective in the absenec of clear evidence that Respondent engaged in any unfair labor practices affecting Coley or of which he would likely have known between Coley's signing of the card on the evening of April 24 and the time he asked Rodger's to withdraw his card on April 28, the date established in the testimony of Rodgers and Hendrix. While Farrell had communicated an offer to

[27] Coley sometime after May 8 also executed one of Respondent's form withdrawal letters and forwarded it to the Union.

Coley of $50 to withdraw his card it is not clear that this occurred before April 28.

Respondent attacked the validity of the card signed by Carl Jones on the basis of Jones' testimony that Rodgers told him the purpose of the card was to "try to get a vote in a Union." To invalidate a card, however, it must be shown that contrary to the express wording of the card a representation was made that it would be used only for a different and more limited purpose. *Photo Drive Up*, supra, at 364. A reference to the use of the card in obtaining an election does not, however, invalidate the card unless such usage is represented as the sole or only purpose. *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1963). The representation made to Jones, I conclude, did not amount to such a representation and I find no question regarding the representations made to Jones which would invalidate the card.

I reach the same result with respect to cards signed by James Browder and Calvin Suttles. Those cards were solicited by Darrell Martin who freely testified that he told Browder and Suttles that the Union had to have 51 percent of the employees to sign cards to have an election. However, Martin's testimony does not establish that he represented that an election was the sole or only purpose of the cards. There is thus no question effecting the validity of the card which would negate its use for majority purposes. *Well-Bred Loaf, Inc.*, 280 NLRB No. 36 (June 11, 1986).

Respondent also attacks the validity of the card of Clark Goforth for majority purposes on the basis of his revocation of the card. Goforth signed one of the form letters distributed by Respondent and forwarded it to the Union. The date he did so was not clear, but it obviously was after May 8 when Respondent distributed the form letters. This was well after the record establishes that Respondent embarked upon its unfair labor practice

campaign and after the two discharges found herein to be unlawful occurred. I therefore conclude Goforth's revocation was ineffective.

The card of Timothy Lenior was identified by union representive Hendrix who related that he received the card from Lenior at the union meeting on April 24. Respondent argues that the signature on the card purporting to be the signature of Lenior is different from the W-4 form signed for Respondent by Lenior and received in evidence herein. Respondent further argues that based on similarity in writing it must have been filled out by the same person who signed the card of Stephen Lenoir. It is well established that a comparison of signatures with a known specimen of an individual's handwriting is an appropriate method of identification, and that a trier of fact, even if not a handwriting expert, may make comparisons of signatures and reach conclusions thereon. *Local 707, Motor Freight Drivers (Claremont Polychemical Corp.)*, 196 NLRB 613, 625 (1972). While the address and employment information portions of the cards of Stephen and Timothy Lenior appear to have been completed by the same person, the purported signature on Timothy Lenior's card is sufficiently similar to that on his W-4 form to preclude me from concluding that they are not the same. Moreover, even if the card was executed by someone other than Timothy Lenoir, Hendrix's testimony remains uncontradicted that Timothy Lenoir handed him the card. By this delivery of the card to Hendrix, Lenoir adopted the authorization stated in the card even if the signature appearing thereon was not his own. Finally, it is clear that through the identification of the card by Hendrix and the circumstances surrounding the signing of the card, the General Counsel established *prima facie* that Lenoir's card was valid. The burden thereafter shifted to Respondent to disprove its validity and establish that Lenoir's signature on the card was not genuine. *Olympic Villas*, 241 NLRB 358, 366 (1979).

Respondent did not call Lenoir to do this and failed to explain his unavailability for this purpose. Considering the foregoing, I find the card of Timothy Lenoir to be a valid one in establishing the Union's majority status.

Lastly Respondent contends the card of Troy Medlin executed on May 5 should be declared invalid because of representations regarding the purpose of the card made to him by Rodgers who solicited the card. Medlin testified variously that Rodgers told him that siging the card was (1) "basically, to try to get the Company to recognize them [the Union] as to have an election;" and (2) "that it was just basically to try to get an election." On the other hand, he answered negatively when questioned by Respondent's counsel whether Rodgers told him that by signing the card it would result in an election and was apparently confused by a question regarding whether he was told the only purpose of the card was to obtain an election. Citing *Well-Bred Loaf, Inc.*, supra, slip. op. 4, n. 7, where the Board suggested that a representation by a solicitor that a card was "just to [have a] vote" coupled with an unresolved conflict between witnesses regarding what representations were made raised sufficient questions regarding the validity of the card to discount the card for majority purposes, Respondent argues the same situation prevails here. In the case sub judice I do not view Medlin's testimony as a precise report of Rodger's words during the solicition as opposed to Medlin's personal conclusions regarding what Rodger's told him. Initially in reaching this conclusion I do not find Medlin's use of the word "just" as one used by Rodgers. Secondly, and in any event, Medlins' use of the word "just" with "basically," even if these words are a precise report of what Rodgers said, clearly reveals "just" was not limiting the use of the card to a sole purpose, but rather pointing out a basic purpose of the card. There was therefore no misrepresentation affecting the validity of the card for majority purposes.

Based on the above I find that on April 27 the unit consisted of 34 employees and the Union had valid authorization cards from 19 employees, a clear majority. By April 29 Armstrong had been lawfully discharged and Coley had effectively withdrawn his card leaving the Union still with a majority of 17 out of 33 unit employees. On May 5 Respondent hired two new employees Cozart and Benton into the unit, but by then the Union had obtained the authorization cards of Steve Smith and Troy Medlin and retained a majority status, at that point having 19 cards (including those of Tidwell and Hamby who I have found were unlawfully discharged) out of a unit of 35 employees. I find therefore that at all relevant times the Union represented a majority of Respondent's unit employees.

C. *Application of Gissel Standards*

John Williams, a district director of the Union, testified he sent the following mailgram to Respondent in the afternoon of April 28.

> This is to inform you that the Oil Chemical and Atomic Workers International Union now represents the majority of the employees at the Avecor Incorporated Vonore, Tennessee facility. As you know, these employees exercised their rights as set forth under the NLRB Act. We expect you and your agent to abide by these applicable laws or face civil and possible criminal charges being filed.

Respondent through Willoughby, to whom the mailgram was specifically addressed, and Klarich disputed having ever received the mailgram. No evidence was offered by the General Counsel to establish Respondent's receipt of the mailgram. While a letter deposited in the mail under appropriate circumstances might be presumed to have been delivered I find it unnecessary to make a similar presumption here for I find that the mailgram in any

event did not by its own language constitute a valid request for recognition or bargaining. Even the Union's filing of the petition on April 30 did not amount to, and can not be regarded as, a request for recognition. *Production Plating Co.*, supra. However, the absence of a request for recognition and bargaining does not preclude the entry of a bargaining order in the case, if one is otherwise warranted to remedy Respondent's unfair labor practices which preclude the likelihood of free employee choice in a secret ballot election. See *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 (1969); *J. & G. Wall Baking Co., Inc.*, 272 NLRB 1008 (1984); *Ohio New and Rebuilt Parts, Inc.*, 267 NLRB 420 (1983). The General Counsel and Charging Party argue that a remedial bargaining order is warranted here. Respondent as could be expected takes a contrary position.

In *Gissel* supra, the Supreme Court set forth the following categories to be used in determining whether to impose bargaining orders to remedy unfair labor practices: (1) A bargaining order may be granted where an employer's unfair labor practices are "outrageous" and "pervasive"; (2) A bargaining order may be granted in less extraordinary cases marked by less pervasive unfair labor practices which nonetheless have a tendency to undermine majority strength; and (3) A bargaining order is not appropriate in cases involving minor or less extensive unfair labor practices "which, because of their minimal impact on the election machinery, will not sustain a bargaining order." In weighing the pervasiveness of violations of the Act the Board has held that relevant considerations include "the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice." *Michigan Expediting Services, Inc.*; 282 NLRB No. 30, slip op. at 4 (Nov. 20, 1986).

Particularly pervasive unfair labor practices which are deemed highly coercive and are likely to have a longer lasting and inhibitive affect on a substantial percentage of the work force are frequently referred to as "hallmark" violations. Examples of hallmark violations are threats to plant closure, threats of discharge, and the actual discriminatory discharge of employees. However, even the finding of "hallmark" violations does not automatically dictate the appropriateness of a bargaining order. In the final analysis, as the Board stated in *Sangamo Western, Inc.*, 273 NLRB 256, 257 (1984), the issue of whether a *Gissel* bargaining order is appropriate "must be answered in light of the facts of each case and with due regard for the principle that generally a secret-ballot Board conducted election is a preferred method of ascertaining employee choice."

Applying the foregoing principles to the case sub judice I am compelled to the conclusion that Respondent's unfair labor practices found herein fall within the second *Gissel* category thus making a bargaining order appropriate. In reaching this conclusion I note initially that the bargaining unit was a small one consisting of only 34 employees.[28] In a unit of this size Respondent's unfair labor practices are likely to have a more substantial impact, particularly considering that most of the unit employees were directly affected by the unfair labor practices. First in this regard, as I have found, two employees were discriminatorily discharged. That amounts to an unlawful discharge of roughly 6 percent of the unit, and therefore likely to

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[28] Respondent asserts that at the time the hearing herein closed the bargaining unit had changed significantly as a result of growth and trunover. The Board, as distinguished from the position of some of its members, has not included turnover as a factor in determining the appropriateness of bargaining order remedy. See *Impact Industries, Inc.*, 285 NLRB No. 2 (July 30, 1987), enforcement denied 847 F.2d 379 (7th Cir. 1988); *Long-Airdox Co.*, 277 NLRB 1157 (1985). CF. concurring opinion of Member Dennis in *Regency Manor Nursing Home*, 275 NLRB 1261, 1262 (1985).

have a substantial and lasting impact on employee free choice. The Board has said that "unlawful discharge or layoff is one of the most flagrant and severe acts an employer can take to dissuade employees from selecting a bargaining representative." *Groves Truck and Trailer*, 281 NLRB No. 161, slip op. at 8 (September 30, 1986). Indeed, the fact that the discharges here during the union campaign were of great concern to employees was demonstrated by Hurst's expression of concern to Willoughby over his own possible discharge or layoff for union activity. Similarly, based upon Supervisor Farrell's testimony, it is clear the employees were concerned about Tidwell's discharge for one employee raised a question at an employees meeting with management, the one on May 14, whether Tidwell's discharge had anything to do with the Union. Willoughby in his testimony acknowledged that the question was raised, and he assertedly denied any relationship between Tidwell's discharge and union activity. Farrell in his testimony did not attribute a specific denial to Willoughby, only a recitation of his view of the circumstances of Tidwell's discharge. Whether or not there was a specific denial by Willoughby of an unlawful discharge I am persuaded that his recitation of his version of the circumstances of the discharge did little to assuage concern of employees that the discharge was in fact related to union activities. It was clear that employees viewed Tidwell as a union leader and the likely target for discrimination. Even Willoughby conceded that subsequent to Tidwell's discharge unit employee Clarence Jackson had told Willoughby that in firing Tidwell he had gotten one of the main union instigators. Moreover, the discharge of Hamby, a union card signer, only a few days after Tidwell had the likely effect of increasing employee concerns about the risks involved in union activity.

Beyond the unlawful discharges, Respondent committed several violations of Section 8(a)(1) of the Act. At least one of them falling into the "hallmark" category. Thus,

there was Ingram's threat to Hamby that the Union would cause Respondent to close its doors. And there were only slightly less serious violations consisting of the threats of more strict rule enforcement with the Union and the promise of more wages without a union. These violations occurred at the May 14 meeting attended by all the unit employees assuring dissemination to, and impact upon, the entire unit. And Respondent continued its unlawful conduct until 2 to 3 days prior to the election when, as it was previously found, Willoughby told employees that with a Union they could not get the favors that they had enjoyed in the past.

Lastly it must be noted that the violations were committed, not primarily by low level supervisors, but by the higher management officials, Klarich and Willoughby. The coerciveness of their unlawful remarks is increased by the likely perception among employees that by virtue of their high positions they have the authority and ability to implement or execute their unlawful threats and promises. See *Long-Airdox*, supra at 1160.

Respondent in its brief argues, that no bargaining order is warranted here because, in effect, it has not been demonstrated by an unfair labor practice history that Respondent has a proclivity to violate the Act. In support of this argument Respondent points to the fact that during the Steelworkers' campaign the preceding year which culminated in an election in which the union received no votes, no unfair labor practices were attributed to Respondent. Although the absence of an unfair labor practice history precludes any finding of a proclivity to violate the Act, it does not preclude the finding here reached that Respondent in fact violated the Act and that such violations are sufficiently pervasive to preclude the implementation of traditional remedies.

Respondent also argues that the Union's proceeding to the election on June 25 with its awareness of Respondent's

unfair labor practices demonstrated the Union's belief that a free and fair election could be held, and this supports Respondent's arguments that only a rerun election is the appropriate remedy here. I find no merit in this argument. Long ago the Board stated in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, 1280 (1964):

> The fact that in an election a vote favorable to the Union may obviate for it a necessity for pursuing the unfair labor practice route does not, in our view, warrant requiring the Union to forfeit the right to request that the effect upon it of the employer's unlawful conduct be rectified when it develops that such conduct has been sufficiently onerous to interfere with the election and to cause a substantial deterioration in the union's status.

Since the Union under *Bernel Foam* retains the right to proceed along the unfair labor practice route, its decision to proceed to the election and the quicker resolution of the representation issue it normally affords, notwithstanding the Respondent's unfair labor practices, demonstrates not a "belief" but only a hope that a fair election could be held. That this hope was dashed demonstrates only the effectiveness of the Respondent's unlawful conduct.

Considering the total circumstances of this case and all those factors noted above regarding the small size of the unit, the unlawful discharge of two employees, the likely impact of all the unlawful conduct on unit employees, and the fact that much of the unlawful conduct was committed by high Respondent officials, I find that it is improbable that the use of traditional remedies here would be sufficient to ensure a fair rerun election. I further find that the employees uncoerced choice of representative previously expressed by union cards, on balance, would be better protected by the issuance of a *Gissel* remedial bargaining order. Since the Union first obtained majority

status through cards on April 27[29] and the Respondent having embarked upon its unfair labor practices on April 27 and shortly prior thereto, the recommended bargaining order herein will be made effective April 27. See *Grey's Colonial Acres Boarding Home*, supra; *Peaker Run Coal Co.*, 228 NLRB 93 (1977); *Trading Port, Inc.*, 219 NLRB 298 (1975).

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section II above occurring in connection with the operations of Respondent described in Section I above had a close, intimate and substantial relationship to trade, traffic, and commerce among the several states and tend to result in labor disputes burdening and obstructing commerce and to the free flow thereof.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

a. Implying to employees that it would consider granting wage increases to induce them to forego their union support.

b. Threatening its employees that it would close its doors if they selected the Union to represent them.

b. Interrogating employees concerning their union membership activities and desires.

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[29] On this date the Union had 19 executed cards including those of Tidwell and Armstrong, in a unit of 34 employees.

d. Threatening its employees with more strict rule enforcement and the refusal to grant future favors if they selected the Union to represent them.

e. Promising its employees more raises and benefits if they did not select the Union to represent them.

f. Offering employees money or other benefits to induc them to seek the return of their union authorization cards.

4. Respondent violated Section 8(a)(3) and (1) of the Act by discharging Jeffrey Tidwell and Leroy Hamby because of their support of the Union.

5. The following unit is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its Vonore, Tennessee facility, including leadmen, laboratory employees, dry color employees, shipping and receiving employees and quality control employees, but excluding all office clerical employees, guards and supervisors as defined in the Act.

6. The Union's objection No. 3 to the election in Case 10-RC-13492 has merit and must be sustained and when coupled with Respondent's other unlawful conduct occurring in the critical period require that the election held June 25, 1987 be set aside.

7. On April 27, 1987 the Union obtained signed union authorization cards from a majority of Respondent's employees in the bargaining unit described above in paragraph 5.

8. Since on or about April 27, 1987 when Respondent commenced engaging in unfair labor practices the Union has been the exclusive representative of Respondent's employees in the unit described above in paragraph 5 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

9. By virtue of its unfair labor practices set forth in paragraphs 3 and 4 above Respondent has attempted to undermine the Union's majority status and has precluded the holding of a fair rerun election thereby making a bargaining order an appropriate remedy herein.

10. The unfair labor practices set forth in paragraphs 3 and 4 above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

11. Respondent did not engage in unfair labor practices in any other manner alleged in the complaint and not specifically found herein.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices I shall recommend that it be required to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged employees Jeffrey Tidwell and Leroy Hamby the recommended order will require that these two employees be offered immediate and full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges. In addition the recommended order will require that these two employees be made whole for any loss of earnings they may have suffered by virtue of the unlawful discrimination against them, by payment to them of a sum equal to that which they would have earned absent the discrimination, with backpay computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for*

the Retarded, 283 NLRB No. 1981 (May 28, 1987).[30] I shall also recommend, consistent with the Board's holding in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), that Respondent be required to expunge from its records any reference to the discharges of Tidwell and Hamby and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used in future personnel actions against them.

Finally, it follows from the recomemnded issuance of a bargaining order that Respondent's violations of the Act are sufficiently egregious to warrant the entry of a broad cease and desise order. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[31]

ORDER

Respondent, Avecor, Inc., Vonore, Tennessee its agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discharging against its employees because they join, support, or assist Oil, Chemical, and Atomic Workers International Union in order to discourge the membership in, support, or assistance of the Union by its other employees.

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[30] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Implying to employees that it would consider granting them wage increases to induce them to forego their union activity.

(c) Threatening employees that it will close its doors if they select the Union to represent them.

(d) Interrogating its employees concerning their union membership, activities, and desires.

(e) Threatening its employees with more strict rule enforcement and the refusal to grant future favors if they select the Union to represent them.

(f) Promising its employees more raises and benefits if they do not select the Union to represent them.

(g) Offering employees money or other benefits to induce them to seek the return of their union authorization cards.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the fololwing affirmative action designed to effectuate the policies of the Act.

(a) Upon request of the Union, bargain collectively with it as the exclusive collective bargaining representative of Respondent's employees in the following union appropriate for bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an undertsanding is reached, embody such understanding in a signed agreement:

> All production and maintenance employees employed by Resondent at its Vonore, Tennessee facility, including leadmen, laboratory employees, dry color employees, shipping and receiving employees and quality control employees, but excluding all office clerical

employees, guards and supervisors as defined in the Act.

(b) Offer Jeffrey Tidwell and Leroy Hamby full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole in the manner set fort hin the section of this decision entitled "The Remedy" for any loss of earnings they may have suffered by the reason of the discrimination against them.

(c) Expunge from its files any references to the discharges of Jeffrey Tidwell and Leroy Hamby and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Vonore, Tennessee place of business copies of the attached notice marked "Appendix."[32] Copies of the notice on forms provided by the Regional Director for Region 10, shall be posted by Respondent immediately upon receipt thereof, and maintained for 60 consecutive days in conspicuous places, places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure

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[32] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the complaint not specifically found herein be dismissed.

IT IS FURTHER ORDERED that the Union's objection 3 to the election in Ca[illegible] 10-RC-13492 and the other objectionable conduct of Respondent found herein be sustained, that the Union's objections 9, 10, 11, 12, 13, 17, 21, 22, be dismissed, that the results of the election in case 10-RC-13492 on June 25, 1987 be set aside, that case 10-RC-13492 be severed from cases 10-CA-22645 and 10-CA-22886, and that the petition in Case 10-RC-13492 be dismissed.

Dated Washington, D.C. September 30, 1988.

/s/ Hutton S. Brandon
HUTTON S. BRANDON
Administrative Law Judge

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT imply to our employees that we will consider granting them a wage increase to induce them to forego their union activity on behalf of Oil, Chemical and Atomic Workers International Union.

WE WILL NOT threaten employees that we will close our doors if they select the union to represent them.

WE WILL NOT interrogate our employees concerning their union membership activities and desires.

WE WILL NOT threaten our employees with more strict enforcement of rules and the refusal to grant future favors if they select the Union to represent them.

WE WILL NOT promise our employees more raises and benefits if they do not select the Union to represent them.

WE WILL NOT offer employees money or other benefits to secure the return of their union authorization cards.

WE WILL NOT discharge or otherwise discriminate against employees because of their union activities and sympathies.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Jeffery Tidwell and Leroy Hamby immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent position, without prejudice to their seniority or any other rights and privileges enjoyed and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL expunge from our files any reference to the discharges of Jeffery Tidwell and Leroy Hamby and notify them in writing that this has been done and that evidence of their unlawful discharge will not be used as basis for future personnel action against them.

WE WILL upon request of Oil, Chemical and Atomic Workers International Union bargain collectively with it as exclusive collective bargaining representative of our employees in the following unit found appropriate for bargaining with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement:

> All production and maintenance employees employed by Respondent at its Vonore, Tennessee facility, including leadmen, laboratory employees, dry color employees, shipping and receiving employees and quality control employees, but excluding all office clerical employees, guards and supervisors as defined in the Act.

AVECOR, INC.
(Employer)

Dated: By:

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Street, N.W., Suite 2400, Atlanta, GA 30323-2400. Telephone: (404) 331-2886.

No. 91-595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Petitioner,
v.
AVECOR, INC.,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT AVECOR'S BRIEF IN OPPOSITION

DIANE E. STANTON
(Counsel of Record for AVECOR, INC.)
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
2400 Peachtree Center — Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303-1509
(404)525-8200

Lex Publishing Company, 23rd Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION,
Petitioner,
v.
AVECOR, INC.
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.[*]

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT AVECOR'S BRIEF IN OPPOSITION

Avecor, Inc. respectfully requests this Court to deny the Union's Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the D.C. Circuit.

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[*] The caption submitted by the Union and docketed by the Clerk of the Supreme Court was that used when the underlying case was before the United States Court of Appeals for the District of Columbia. Counsel for Avecor, Inc. has been advised by counsel for the National Labor Relations Board that the caption herein correctly identifies the parties in this proceeding, and we ask that the docket be modified accordingly.

I. STATEMENT OF THE CASE

This case arises under the National Labor Relations Act ("Act"). 29 U.S.C. § 151, *et seq.* A National Labor Relations Board ("NLRB" or "Board") representation election was held on June 25, 1987 among certain employees of Avecor, Inc. ("Employer") at its plant in Vonore, Tennessee, pursuant to a petition filed by the Oil, Chemical and Atomic Workers International Union ("Union"). The Union was defeated in the election and thereafter filed both objections and unfair labor practice charges alleging numerous violations of Section 8(a)(1) and (3) of the Act.

The Board issued a Consolidated Complaint. The relief sought in the Complaint by the General Counsel included the imposition of a remedial bargaining order.

A hearing was held on the Complaint before NLRB Administrative Law Judge Hutton S. Brandon ("ALJ") on numerous dates in 1988. The decision of the ALJ issued and the case was transferred to the Board on September 30, 1988. The ALJ found no merit to many of the allegations in the Complaint, but ruled that the Employer committed certain violations of Section 8(a)(1) of the Act. The ALJ also found that the Employer's discharge of two (2) employees, Jeff Tidwell and Leroy Hamby, violated Section 8(a)(3) of the Act. Finally, the ALJ found that the Union attained majority status, as evidenced by signed authorization cards, on April 27, 1987, and ordered the Employer to recognize and bargain with the Union as the remedy for the unfair labor practices found.

The Employer filed exceptions to the ALJ's decision with the Board and on September 22, 1989, the Board issued its Decision and Order (published at 296 NLRB No. 94), in which it, with one minor exception, adopted the ALJ's decision *pro forma*.

The Employer filed a Petition for Review of the Board's decision with the D.C. Circuit Court of Appeals ("court") on October 24, 1989. On April 26, 1991, the court issued its opinion in which it overturned one of the two (2) 8(a)(3) findings and refused to enforce the bargaining order. It remanded the case to the Board with instructions to explain its interpretation of the stipulated election unit and whether the order entry clerk and lab secretary positions should be included, in light of apparently controlling Board precedent.

The court also directed the Board to reconsider whether a bargaining order was an appropriate remedy in this case. The court concluded that three factors prevented enforcement of the Board's bargaining order. First, since the court had extinguished at least one "hallmark violation" by finding the Hamby termination was lawful, the court directed the Board to consider whether the remaining unfair labor practices were serious enough, or pervasive enough, to prevent holding a rerun election. If the Board first resolved this issue in the affirmative, the court directed the Board then to consider the second factor: was a bargaining order appropriate in light of turnover in the voting unit that had occurred since the election? Lastly, regardless of how the Board resolved the second factor, the court directed the Board to provide a reasoned explanation for why a bargaining order, an extraordinary remedy, was required in this case as opposed to a second

election. The Union's Petition for Writ of Certiorari seeks review of the second factor only.

On August 14, 1991, the Board accepted remand of the case from the court and requested that all parties submit a statement of position concerning these issues. Each party has submitted its statement of position and the Board currently is reconsidering its decision to issue a bargaining order based on the court's instructions on remand. In the interim, the Union filed its Petition for Writ of Certiorari seeking review of that portion of the court's order directing the Board to consider evidence of employee turnover in deciding whether a bargaining order is an appropriate remedy. Because the Union is seeking review of only one aspect of the court's order and, as will be explained below, that issue may well become moot following the remand currently before the Board, the Union's Petition for Writ of Certiorari should be denied inasmuch as the controversy is not ripe for review.

II. ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE ISSUE PRESENTED IS NOT RIPE FOR REVIEW

The Union's Petition for Writ of Certiorari is premature. The D.C. Circuit Court of Appeals has remanded this case to the Board for the purpose of reconsidering whether a bargaining order is an appropriate remedy in light of the court's modified findings, observations and conclusions of law. The Board accepted the remand, but has not yet acted in accordance with the remand instructions.

The first issue to be considered by the Board in this regard is whether, in light of the appellate court's reversal of the Hamby termination and the court's characterization of the remaining unfair labor practices, is a bargaining order justified? In ordering the case remanded, the court stated:

> We have concluded that the Hamby firing was not unlawful, and we suggest that Ingram's isolated remark to Hamby was less heinous than the ALJ painted it. Consequently, "a significant question is presented whether the remaining unfair labor practices in this case are serious enough or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair election." *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1011 (D.C. Cir. 1981). The Board must, therefore, consider whether the remaining violations justify a bargaining order.

P. 21(a) Petition for Writ of Certiorari.

The Union seeks review of the court's order directing the Board to consider evidence of bargaining unit turnover in deciding the appropriateness of a remedial bargaining order. However, the Board is *only* to address this issue if it *first* decides that a bargaining order is justified based on the unfair labor practice violations found. In light of the court's modified findings and observations, it is very possible that the Board will determine that the remaining violations do *not* justify a bargaining order. Therefore, the question the Union seeks to have reviewed in its Petition for Writ of Certiorari would be rendered moot. Accordingly, the question presented is not ripe for review by this Court and the Petition for Writ of Certiorari should be denied.

This Court has previously determined certiorari to be inappropriate in analogous circumstances. In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 88 S. Ct. 437 (1967), an arbitration award had been rendered regarding the manning of trains and engines in freight service. The union contended the award expired as of a certain date and threatened to strike over the issue thereafter. The railroad obtained a restraining order in federal district court barring a strike prior to the expiration date, but the union called a work stoppage anyway. The district court held the union in contempt of the restraining order and levied substantial fines. The court of appeals ruled on various legal issues presented to it but remanded the case to the district court to determine whether there had, in fact, been contempt, and if so, whether it was of such a magnitude as to warrant the fine originally imposed. The union unsuccessfully sought review by the Supreme Court.

The Supreme Court held (per curiam):

> Petitioners seek certiorari to review adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not ripe for review by the Court. The petition for a writ of certiorari is denied. *See, Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916).

389 U.S. at 328, 88 S. Ct. at 488.

In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S. Ct. 269 (1916), a shoe manufacturer brought suit against a competitor for trade-mark infringement and unfair competition. Following a

hearing, the trial court dismissed the complaint. The circuit court of appeals, however, reversed as to the unfair competition claim and found for the plaintiff. The court directed that the lower court issue an injunction against the offending practice and conduct an accounting limited to the period following the commencement of suit (to be supervised by a referee). The Supreme Court denied plaintiff's petition for writ of certiorari holding that the decree of the court of appeals was not a final one and therefore certiorari was denied.

The same result is mandated here. A petition for certiorari will be granted only when there are special and important reasons therefor. Rule 10, Supreme Court Rules. Those circumstances are not present here. The question sought to be reviewed is not ripe for review since there is a substantial likelihood the Board will conclude on remand that a bargaining order is not warranted and that the remedy of a second election is sufficient to protect the employees' rights under the Act. The Board has accepted the remand from the court of appeals and must first be given the opportunity to reconsider its decision. To grant the petition now would be to deprive the Board of its rightful responsibility to determine, in the first instance, the appropriate remedy.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DIANE E. STANTON
Counsel of Record for AVECOR, Inc.

JACKSON, LEWIS, SCHNITZLER & KRUPMAN
2400 Peachtree Center — Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303-1509
(404)525-8200

No. 91-595

In the Supreme Court of the United States

OCTOBER TERM, 1991

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, PETITIONER

v.

AVECOR, INC., AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board, in determining whether a bargaining order is necessary to remedy unfair labor practices committed by an employer during a union election campaign, is required to consider evidence of employee turnover subsequent to the unfair labor practices.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 931 F.2d 924. The decision and order of the National Labor Relations Board (Pet. App. 36a-123a) is reported at 296 N.L.R.B. No. 94.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1991. A petition for rehearing was denied on July 3, 1991. Pet. App. 29a. The petition for a writ of certiorari was filed on October 1, 1991. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1987, petitioner Oil, Chemical and Atomic Workers International Union (Union) began a campaign to organize approximately 30 employees of a Tennessee chemical pigment plant operated by respondent Avecor, Inc.[1] Pet. App. 41a-42a. By April 27, a majority of the employees had signed cards authorizing petitioner to represent them. *Id.* at 102a. A representation election was held in late June 1987; petitioner lost by a vote of 10 to 22, with 5 challenged ballots. *Id.* at 40a & n.2.

Petitioner filed unfair labor practice charges and election objections that were consolidated for hearing before an administrative law judge. The ALJ found that respondent had committed multiple violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), including threats of plant closure, stricter enforcement of rules, reduced favors, implicit and explicit promises of benefit to discourage union support, and coercive interrogations. The ALJ also found that respondent had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discharging two employees because of their union support. Pet. App. 36a-37a, 114a-115a.

The ALJ recommended that the election be set aside and a *Gissel* bargaining order issue.[2] Pet. App. 99a-

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[1] The caption of the petition for certiorari incorrectly identifies Avecor, Inc., as the petitioner and the Union as an intervenor. In fact, the Union is the petitioner and Avecor, Inc., is a respondent. In this brief, "respondent" refers to Avecor, Inc.

[2] In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Court held that the Board could impose a bargaining order

100a. The ALJ found that the two discharges and the threat of plant closure were "hallmark" violations, *id.* at 111a-112a, and that the threat of stricter rule enforcement and the promise of higher wages were only "slightly less serious." *Id.* at 112a. The violations were found likely to have a "substantial and lasting impact on employee free choice" because they were committed primarily by "higher management officials," the unit was small, and "most of the unit employees were directly affected." *Id.* at 110a, 111a, 112a, 113a. The ALJ refused to consider respondent's argument that, by the time the hearing closed, the bargaining unit had changed significantly as a result of growth and turnover. *Id.* at 110a n.28.

The Board adopted the ALJ's recommended remedy and ordered respondent to bargain with petitioner. Pet. App. 37a, 118a.

2. The court of appeals affirmed the Board's unfair labor practice findings except for the finding that employee Hamby was unlawfully discharged. Pet. App. 9a-10a. In addition, although the court affirmed the finding of a plant closure threat, it rejected the Board's characterization of the threat as a "hallmark" violation, noting that the threat was made by one supervisor to one employee, in response to a direct question. *Id.* at 12a-13a, 20a-21a. The court declined to enforce the *Gissel* bargaining order on the ground that "a significant question is presented whether the

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instead of holding a rerun election in two categories of cases: (1) where an employer committed " 'outrageous' and 'pervasive' " unfair labor practices, and (2) in cases marked by less pervasive unfair labor practices which nevertheless "have the tendency to undermine majority strength and impede the election processes." *Id.* at 613-614. See Pet. App. 109a. The ALJ concluded that respondent's unfair labor practices fell into the second *Gissel* category. *Id.* at 110a.

remaining unfair labor practices in this case are serious enough, or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair rerun election." *Id.* at 21a. The court therefore remanded the case to the Board to determine whether the remaining violations justify a bargaining order. *Ibid.*

The court further directed that, on remand, the Board should consider the evidence of employee turnover that respondent had proffered at the hearing, as well as any subsequent turnover that may have "occurred up to the time [the Board] would issue the new order." Pet. App. 23a. The court observed that "[s]ubstantial changes in the workplace * * * may render * * * untenable" a finding that "the employer has so polluted the electoral process that the wishes of the employees will be better reflected by an old card majority than by a new election." *Id.* at 21a. Although the court acknowledged that the courts of appeals have adopted divergent views as to whether the Board is required to take post-election events into consideration in issuing *Gissel* bargaining orders, and that the District of Columbia Circuit's own decisions have been inconsistent on this point, *id.* at 22a, the court held that "before issuing a category II bargaining order, the Board must carefully consider employee turnover." *Id.* at 23a.

The court stated that, on remand, the Board must determine whether respondent's "actions in the spring of 1987 left so lasting an imprint that a fair rerun election cannot be assured; or whether, to the contrary, 'changes in [respondent's] work force have made a bargaining order now inappropriate, even if one might have been appropriate at some earlier time.'" Pet. App. 24a. The court also asserted that

the Board had not adequately explained why it thought respondent's unlawful conduct was likely to linger or why other remedies would not "cleanse the environment enough to permit a fair election." *Id.* at 25a-26a.

ARGUMENT

The Board's position is that the appropriateness of a bargaining order in category II *Gissel* cases "depends on an evaluation of circumstances when the unfair labor practices were committed." *Eddyleon Chocolate Co.*, 1991-92 NLRB Dec. (CCH) ¶ 16,503, at 31,074 n.28 (Feb. 27, 1991). Accordingly, the Board takes the position that employee turnover—whether it occurs before or after the unfair labor practice hearing—is not a factor relevant to determining whether a remedial bargaining order is appropriate. *Ibid.*; *M.P.C. Plating*, 1989-90 NLRB Dec. (CCH) ¶ 15,775, at 29,745 (June 15, 1989), enforcement denied in relevant part, 912 F.2d 883, 888-889 (6th Cir. 1990); *Salvation Army Williams Memorial Residence*, 293 N.L.R.B. 944 (1989), enforced mem., 923 F.2d 846 (2d Cir. 1990). The Board's position is based upon decisions of this Court holding, in other contexts, that the Board is not required to take account of the current status of a union's majority support in issuing a bargaining order to remedy an unlawful refusal to bargain. See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros.* v. *NLRB*, 321 U.S. 702, 704-705 (1944). *Gissel* suggests that the same rule is appropriate where the employer's unfair labor practices make it unlikely that a fair election could be held. Indeed, in *Gissel*, the Court stated that

> where an employer has committed independent unfair labor practices which have made the hold-

> ing of a fair election unlikely * * * the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB* v. *Katz*, 369 U.S. 736, 748, n.16 (1962); *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board had the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board.

395 U.S. at 610.

Although the Board's judgment as to the appropriate remedy for unfair labor practices is entitled to deference, see *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984), we nevertheless believe that review of the question presented in this case at this time would be premature. Should the Board conclude on remand that a bargaining order is no longer appropriate in view of the court of appeals' rejection of the finding respecting Hamby's discharge and its refusal to treat the supervisor's plant closure threat as a "hallmark violation," the question of employee turnover would become academic. On the other hand, should the Board find that a bargaining order is not warranted in light of the turnover in the unit, petitioner will be able to challenge that finding in the court of appeals and, if it loses there, in this Court. Finally, should the Board reaffirm the need for a bargaining order after considering the impact of employee turnover, and if the court of appeals refuses

to enforce the Board's order, the Board or petitioner will be able to seek this Court's review at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel
D. RANDALL FRYE
Acting Deputy General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
National Labor Relations Board

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